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CONVEYANCER'S NOTEBOOK

ENLARGEMENT OF LEASEHOLDS

In 1866, when the site of what are now the Law Courts was compulsorily acquired, the compensation for a block of old property was agreed at about £40,000 as a freehold. On the investigation of title by the Treasury Solicitor it was discovered that the property had been leased in the reign of Queen Elizabeth I for 300 years at a peppercorn and that the "owners" of the land were in 1866 merely lessees with only about 20 years to run. The Treasury, therefore, paid them compensation based on the valuation of the leasehold interest. The freehold interest was valued under the Lands Clauses Consolidation Act, 1845, s. 59, and the compensation paid into the Bank of England. In due course, no one having claimed the compensation, the Treasury got it back.

We do not know that there is any moral to this story, but conveyancers faced with such a title would consider whether they could improve it by some device. Perhaps the Land Registry might register the owners as owners in fee simple. If they lost the title deeds, they would be better off. From time to time one comes across these old leases and sometimes they can be enlarged. The subject of enlargement has received curiously little attention, particularly as to the effect on the rights of the previous owner in fee simple. They are preserved to a greater or less extent and it has been suggested more than once that an effective way of making the burden of positive covenants run with freehold land is to grant a long lease with a view to its immediate enlargement.

We publish in this issue an article on enlargement containing a very full examination of the subject by Mr. T. P. D. Taylor. We cannot pretend that we agree with Mr. Taylor on all points but we found the article very stimulating and, having regard to

the anomalies and difficulties, we make no apologies for either its length or the academic nature of some parts of it.

Solicitors' Costs

In *Re Fraser* [1958] 1 W.L.R. 6 there were two plaintiffs and six defendants and all their costs were to come out of a certain fund. The solicitors for the Public Trustee, one of the defendants, carried in for taxation a bill consisting as to about 85 per cent. of a lump sum charge. The taxing master thought this was the wrong way of dealing with the matter and required an itemised bill to be brought in. The solicitors took out a summons to review. On the hearing of the summons the other parties did not appear, possibly because they did not feel that they were adversely affected. Roxburgh J. held that the procedure was wrong and that the taxing master must complete the taxation first.

During the course of his judgment the learned judge said: "I do not know why the taxing master should be allowed to form an opinion on the point as to whether, if he does tax the bill, the questions which will arise on that taxation will be questions of principle. . . . Apparently, all the parties appeared before the master, but nobody except the first defendant has appeared before me. In that they have done nothing wrong. Nobody is bound to appear before the judge if he does not want to do so. In this particular case it is going probably to involve them in some costs, but that is their affair. I would, however, point out that it is not very satisfactory for any judge if he is told by the taxing master that he is asked to decide a question of principle —that is the taxing master's own description of the case, whether right or wrong—and he finds this principle is going to be argued on one side only, though there are six parties interested in arguing against the Public Trustee on this matter."

When it is borne in mind that the summons related to a charge of under £100, is it not unsatisfactory that the question whether it should be itemised or lump sum cannot, apparently, be dealt with expeditiously and cheaply? If all the parties, or a sufficient number, had appeared on the summons, we might have had the unhappy spectacle of the cost of deciding the form of the bill exceeding one-third of the amount of the bill. The whole system of solicitors' costs in litigious matters is utterly antiquated and the scale of them derisory. The blame does not lie with the Law Society, who have pressed both aspects again and again, but totally without effect. The feeling of inequity is enhanced by the fact that the fees of the Bar have, quite properly, received attention.

Rent Act, 1957—Withdrawal of Proposal Notice

The authors of the articles on the Rent Act, 1957, expressed the opinion (*ante*, p. 7) that, if a landlord can persuade the local authority that the defects specified in a Form J notice of their proposal to issue a certificate of disrepair are too wide, the local authority could withdraw the notice and serve a new one. A town clerk writes to say that he disagrees with this view: once the tenant has served his notice and the proper steps have been gone through resulting in a proposal notice, there is no power to withdraw the notice, as any matters of dispute are by the Act to be resolved by the county court.

The authors reply that Schedule I, para. 4 (2), puts a duty on the local authority to issue a certificate of disrepair if they are satisfied as to the matters required by the Act. They must, in the authors' view, be satisfied at the time when they issue the certificate. If for any reason after service of a proposal notice and before issue of the certificate the local authority cease to be satisfied, *e.g.*, as a result of persuasion by the landlord, as to all the defects in the proposal notice, they cannot issue a certificate of disrepair in respect of all those defects. Therefore they should serve a fresh proposal notice specifying the defects in respect of which they are now satisfied.

With respect, it seems to us that the authors take the more practical and realistic view. The jurisdiction of the court does not arise until the local authority issues or fails to issue a certificate of disrepair and it is hardly reasonable that a local authority should feel bound to issue a certificate, although at the time of issue they are of the opinion that it should not be issued or should not be issued in that form.

H.M. Land Registry Notice

The Chief Land Registrar has issued the following notice:—

"The Chief Land Registrar desires to remind solicitors that he is prepared to act on photographic copies or examined abstracts of documents of record, such as probates, letters of administration and birth, marriage and death certificates, so as to avoid the need for lodging the original documents in the Registry.

"*January*, 1958."

Contracts for Sale by Intending Personal Representatives

Some correspondents have drawn attention to the fact that the standard precedent books do not appear to include a condition in contracts for the sale of land to cover the case of a vendor's

personal representative entering into a contract before he has obtained a grant of representation. There does not seem much difficulty in protecting the vendor against a claim for damages. The rule in *Bain* v. *Fothergill* (1874) L.R. 7 H.L. 158 would take him most of the way and a short clause providing that if a grant were not obtained within so many weeks either side could rescind would take away the rest of the purchaser's meagre claim. In the case of an executor, as he derives his title from the will and not the grant, strictly speaking no special provision is necessary, but he may wish to protect himself against any difficulty arising out of a dispute as to his right to a grant.

We suggest the following clause would be suitable in most cases:—

"This contract is conditional upon the vendors' obtaining a grant of probate [letters of administration] and they undertake to use their best endeavours to obtain such grant before the date fixed for completion. If the vendors fail to obtain such grant, or if a caveat shall be entered against the issue of a grant, before such date, then either party may, by notice in writing to the other of them, rescind this contract, whereupon the deposit shall be returned to the purchaser but without interest or costs."

Such a clause would prevent the vendors from playing fast and loose, but without placing upon them the burden of entering upon contentious business.

SALES TO LOCAL AUTHORITIES

The Council of the Law Society have been successful in their negotiations with the Local Authority Associations to agree an extra-statutory scale for vendors' solicitors' costs where unregistered land is sold to local authorities compulsorily or under threat of compulsion. The Law Society and the Associations urge solicitors and local authorities to adopt the special scale.

Scale of Costs

Purchase Price £			£	Special Scale £ s. d.
Under	100		... ...	10 10 0
	100		... ...	12 12 0
Over	100	not exceeding	150	12 12 0
„	150	„ „	200	12 12 0
„	200	„ „	250	12 12 0
„	250	„ „	300	12 12 0
„	300	„ „	350	12 12 0
„	350	„ „	400	12 12 0
„	400	„ „	450	12 12 0
„	450	„ „	500	12 12 0
„	500	„ „	550	12 12 0

Purchase Price £			£	Special Scale £ s. d.
Over	550	under	600	12 12 0
	600	not exceeding	700	14 0 0
Over	700	„ „	1,000	19 0 0
„	1,000	„ „	1,500	26 0 0
„	1,500	„ „	2,000	34 0 0
„	2,000	„ „	2,500	41 0 0
„	2,500	„ „	3,000	49 0 0
„	3,000	„ „	3,500	54 0 0
„	3,500	„ „	4,000	58 0 0
„	4,000	„ „	5,000	64 0 0
„	5,000	„ „	6,000	70 0 0
„	6,000	„ „	10,000	75 0 0
„	10,000	„ „	15,000	100 0 0
„	15,000	„ „	20,000	125 0 0
„	20,000	„ „	30,000	150 0 0
„	30,000	„ „	40,000	180 0 0
„	40,000	„ „	50,000	215 0 0
„	50,000	„ „	60,000	250 0 0
„	60,000	„ „	70,000	285 0 0
„	70,000	„ „	80,000	320 0 0
„	80,000	„ „	90,000	355 0 0
„	90,000	„ „	100,000	390 0 0
„	100,000	„ „	125,000	400 0 0
„	125,000	„ „	150,000	450 0 0
„	150,000	„ „	175,000	500 0 0
„	175,000	„ „	200,000	550 0 0
„	200,000	without ceiling—by negotiation but not less than £550.		

Notes on the above Scale

1. The scale is to apply to all sales of property with unregistered title which are completed on or after January 1, 1958, provided that the local authority is purchasing under the Lands Clauses Consolidation Act or under any other public or private Act which provides that the vendor's solicitor's charges are payable wholly or in part by the purchaser.

2. The scale is limited to the local authority's liability for the vendor's solicitor's costs; it does not preclude the vendor's solicitor from making a Schedule II charge against his own client in respect of the work for which the local authority is not legally liable.

3. Under section 82 of the Lands Clauses Consolidation Act, 1845, coupled with rule 11 of the Rules applicable to Schedule I, Part I, to the Solicitors' Remuneration Order, 1883 (as amended), the purchasing authority's legal liability extends only to the vendor's solicitor's Schedule II charges for work from the preparation of the abstract of title onwards (see *Re Hampstead Junction Ry., ex p. Buck* (1883) 1 H. & M. 519); in the case of those local authorities who have in the past paid a small fee for the vendor's

solicitor's preliminary work before the abstract, that fee is intended also to be covered by the special scale.

4. The scale is not applicable to transactions where the "expedited completion" procedure is used (*e.g.*, under section 18 of the Town and Country Planning Act, 1944, and section 39 of the Town and Country Planning Act, 1947). Such charges must still be computed under Schedule II.

5. The agreement is confined to sales to local authorities; no similar negotiations have taken place regarding sales to Government Departments or nationalised undertakings.

MORTGAGES AND THE NEW RENT ACT

By Ashley Bramall, m.a., Barrister-at-Law

The comparative unimportance of the mortgage provisions of the Rent Acts is perhaps best illustrated by the fact that the exact scope of those provisions is still a matter of doubt after they have been in operation for forty-two years. As lately as 1953 the Court of Appeal preferred to leave undecided the question whether the protection of the Acts applied to mortgages of houses which are owner-occupied (*Nichols and Another* v. *Walters* [1954] 1 W.L.R. 1), although the better view, supported by Irish decisions, appears to be that the mortgaged property must be let in order that the mortgagor may obtain the protection of the Acts. Assuming that this view is right the pattern of the mortgage provisions is that protection is given to those mortgagors who, as landlords, are restricted in regard to the rents which they can charge to their tenants.

If a mortgage covers several properties it is not necessary that all should be subject to the Rent Acts for the mortgage to be subject to the Acts; it is sufficient if any one of them is rent-controlled, provided that the rateable value of the rent-controlled house or houses is not less than one-tenth of the rateable value of the whole of the property comprised in the mortgage. It may be noted in passing that "rateable value" here still means the rateable value in August, 1914, in the case of "old controlled" houses, and that in April, 1939, in the case of those under "new control." Where some of the property comprised in the mortgage is rent-controlled and some is not the mortgagee has a right, under section 12 (5) of the Act of 1920, to apportion the principal money secured between the controlled property and the remaining property and thus constitute two separate mortgages, one protected by the Acts and the other not. Control does not in any case apply to equitable charges.

Like rent control the control applied to mortgages is two-fold, the mortgagee being restricted in raising the rate of interest and in enforcing his security. Security cannot be enforced so long as the interest payments are not twenty-one days in arrear, the mortgagor's covenants are performed and observed and the property is kept in a proper state of repair. Restriction on enforcement of security is, however, subject to the very important qualification that it does not apply to mortgages where the principal is repayable

by instalments spread over a period of not less than ten years, so that most mortgages granted by building societies and by local authorities under the Small Dwellings Acquisition Act are excluded.

Control of mortgage interest is based on a system of standard rates of interest which remains unchanged in spite of the abolition of the analogous system of standard rents by the Rent Act, 1957. The standard rate of interest depends on whether the mortgage is governed by old control or new control. It must be appreciated, however, that just as a mortgage may be controlled by the Acts even though it includes property which is not rent-controlled at all, so a mortgage may be subject to old control for the purpose of determining the standard rate of interest, even though houses comprised in it are subject to new control from the point of view of rent control, in so far as this retains any importance under the new Act. This will be the case if the mortgage was created before July 2, 1920, and any of the houses comprised in it were rent-controlled at that time.

The Rent Act, 1957, contains no provisions modifying the control over the rate of interest which can be charged, even in those cases where the mortgaged property remains rent-controlled and the landlord becomes entitled to a higher rent under the provisions of the Act. It will, however, have a considerable effect on the scope of the mortgage provisions since the decontrol effected by the Act will result in a large number of mortgages ceasing to be subject to control. This may occur in one of three ways. In the first place a single house which is the subject of a mortgage may be decontrolled by operation of the Act of 1957 and the mortgage will thus cease to be subject to the Acts. Secondly, the removal of one or more houses comprised in the mortgage from the ambit of rent-control may reduce the rateable value of the controlled houses comprised in the mortgage to less than one-tenth of the value of the whole property. Finally, the decontrol of some houses included in a mortgage may enable a mortgagee for the first time to apportion the principal secured by the mortgage between controlled and decontrolled property and thus free the decontrolled property from mortgage control.

One or other of these effects will be most rapidly and simply secured when a house is decontrolled under section 11 (2) of the Act of 1957 by reason of a letting commencing after July 6, 1957. Whatever the rateable value of the house, such a letting will always have the effect of removing the dwelling from control, except where the tenant to whom it is let was, immediately before the new letting, tenant under a controlled tenancy of the same dwelling-house or of one which includes part of the subject-matter

of the new tenancy or of one which is included in the subject-matter of the new tenancy. When a new tenancy is granted which is not covered by this exception decontrol is fully effective immediately on the granting of the tenancy, so that if, immediately before the grant, the dwelling-house was let to another tenant under circumstances which caused the Rent Acts to apply and was subject to a mortgage, that mortgage, which was formerly controlled by the Acts, will, immediately on the new letting, escape from control. Similarly, if the house is one of a number comprised in the same mortgage its exclusion from rent control may cause the value of the controlled houses subject to the mortgage to fall below 10 per cent. of the value of the whole or the landlord may be in a position to exclude that house alone or together with other similarly decontrolled from the control on mortgages by apportioning the mortgage.

The position is different, and in some cases rather anomalous, where the Act of 1957 operates to decontrol a house by reason of its rateable value. Section 11 (1) of the Act limits the operation of the Rent Acts to those houses with rateable values which do not exceed £40 in the Metropolitan Police District and the City of London and £30 elsewhere in England and Wales. Provision is also made in section 11 (3) for the Minister of Housing and Local Government to make orders which may similarly restrict the operation of the Acts to houses below a different rateable value limit, but it is proposed to confine discussion here to the position which arises under section 11 (1), since no orders have yet been made under section 11 (3).

Houses with rateable values above the limits laid down in section 11 (1) became "decontrolled" as soon as the Act came into effect on July 6, 1957, but the Fourth Schedule provides for a transitional period during which the effects of decontrol are to be suspended, both with regard to rent control and with regard to mortgage control. As far as mortgage control is concerned this period of suspension is a simple one, it is to last for fifteen months from the commencement of the Act, that is until October 6, 1958. This period of suspension applies in any case where mortgaged property consists of or comprises one or more houses to which the Rent Acts applied immediately before the date of decontrol, which in the case of houses decontrolled by section 11 (1) is July 6, 1957. In these cases the Acts are to apply in relation to the mortgage as if they had not ceased to apply to the dwelling-house or houses for the period of fifteen months. It will be observed that paragraph 12 of the Fourth Schedule, which makes this provision, does not refer specifically to decontrol under section 11 (1)

and it may be asked whether this period of suspension of the application of decontrol to the mortgage does not also apply to houses which become decontrolled under section 11 (2) by a new letting after July 6, 1957. It appears that this is not so, because the period of fifteen months dates from "the time of decontrol" and that phrase is specifically defined by paragraph 1 of the Fourth Schedule as meaning the time at which the Rent Acts cease to apply to a dwelling-house by virtue of section 11 (1) or (3). The effect of paragraph 11, therefore, is that when a house has become decontrolled by section 11 (1) on July 6, 1957, it continues to count as a controlled house for the purpose of deciding whether the mortgage is controlled, or whether apportionment of the principal secured can take place, until October 6, 1958.

Clearly the purpose of this provision is to secure that those mortgagors who are prevented by the transitional provisions from immediately taking advantage of decontrol to raise the rents of their tenants shall not lose the advantage of the protection of the Rent Acts in respect of their mortgages. In many cases, however, mortgagors who are in fact able to take full advantage of decontrol will still enjoy control in respect of their mortgages and in other cases those who are still not in a position to take advantage of the Act against their tenants will lose protection as mortgagors.

As far as rent control is concerned there is no fixed period of fifteen months during which the full effect of decontrol is suspended. In the first place the period of suspension only applies at all if the tenancy is one which would or might terminate within the period of fifteen months from July 6, 1957. If the tenancy is one which will not expire by effluxion of time and cannot be terminated by notice before October 6, 1958, it is unaffected by the transitional provisions, but normally the landlord will not be able to raise the rent until the tenancy comes to an end. Even if the tenancy is one which is due to come to an end during the period of fifteen months or one which could in the ordinary way be terminated by notice during that period the landlord still cannot get possession or raise the rent, except for rates, until two conditions have been fulfilled, namely, that the period of fifteen months has elapsed and he has given the tenant not less than six months' notice. It may, therefore, happen that some landlords will delay in serving notice with the result that the tenant's period of protection will extend beyond October 6, 1958. Nevertheless, any mortgage of the house will cease to be protected by the Acts on October 6, 1958.

On the other hand, a landlord may be able to obtain an increased rent before October 6, 1958. This may occur because the tenant voluntarily gives up possession or dies without leaving anyone who

is entitled to succeed to his protected occupancy under paragraph 14 of the Fourth Schedule, which applies to tenants enjoying this transitional protection the provisions of section 12 (1) (g) of the Act of 1920 with regard to transmission of controlled tenancies. Further, it may occur because the landlord and tenant take advantage of paragraph 4 of the Fourth Schedule and at some time before the tenant's period of protection comes to an end enter into a tenancy for a fixed term of at least three years. Where this occurs the landlord may charge under the new tenancy a higher rent than that which he would have been able to recover during the period of transitional protection. Thus, in these two cases landlords will be enjoying the benefits of decontrol, but will be able, as mortgagors, to retain the protection of the Acts right up to October 6, 1958.

By providing that the operation of decontrol is to be suspended in relation to mortgages for a fixed period of fifteen months the Act seems to be employing a very blunt instrument in order to meet the situation created by the transitional provisions governing decontrol by reason of rateable value, and to secure only very approximate justice as between mortgagor-landlords and their mortgagees.

[Attention is drawn to *Coutts & Co.* v. *Duntroon Investment Corporation, Ltd.*, noted *post*, p. 159.—Ed.]

FAIR WEAR AND TEAR

By G. F. Peter Mason, m.a., Barrister-at-Law

One of the most familiar qualifications to the liability of a tenant or lessee to keep the demised premises in repair is that expressed to arise out of "fair wear and tear." That the meaning of such expression has never been considered in any reported case by the House of Lords and only thrice by the Court of Appeal is due perhaps to the concealment of its logical (and almost metaphysical) subtleties by the familiar ring of the English idiom. That there are subtleties behind the idiom is manifest from the confusion which surrounded the matter until the recent decision of the Court of Appeal in *Brown* v. *Davies* (*a*).

The classic view of the effect of a repairing covenant containing an exception for fair wear and tear is to be found in the judgment of Tindal C.J. in *Gutteridge* v. *Munyard* (*b*): "What the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute a loss, which so far as it results from time and nature, falls upon the landlord." In other words, it is clear that the value of any property diminishes with time, since the useful life of any building is finite; and no tenant can be expected to arrest the effect of time and to act as the landlord's insurer by surrendering at the end of the term a house with a remaining life identical with that which it had at the beginning of the term. "But," continues the judgment of Tindal C.J., "the tenant is to take care that the premises do not suffer more than the operation of time and nature would effect; he is bound by seasonable applications of labour to keep the house as nearly as possible in the same condition as when it was demised." The tenant must not, by his acts or by his failure to act, reduce the life which the house might reasonably be expected to have, in circumstances which might reasonably be expected to occur.

The rule thus laid down by Tindal C.J. had the advantage of holding the balance evenly between the tenant's rights on the one hand and his liabilities on the other. It made clear that

(*a*) [1957] 3 W.L.R. 818.
(*b*) (1834) 1 Moo. & R. 334.

even where the tenant was exempted from liability for disrepair caused by "fair wear and tear" he could not regard this as *carte blanche* to sit back and do nothing, allowing the action of the elements and his normal user of the premises to bring the premises gradually into a state of complete disrepair. He was under a duty to do such repairs (as and when required) as would maintain the premises as nearly as possible in the state they were in at the beginning of the lease.

The rule thus stated had the further advantage of intelligibility, and it survived without serious question for more than a century. It was applied in, for example, a case where a testator had devised a dwelling-house to his wife for life, "she keeping the same in good repair and condition (reasonable wear and tear excepted)." After his death the widow remained in the house for forty-two years, when it was found to be in a "very shocking state of disrepair"; the widow had done nothing actually to injure the house but had omitted almost entirely to repair it and had done little to counteract the decay. Salter J. held that although it was difficult to hold that the dilapidations were not caused by reasonable wear and tear, nevertheless they were altogether unreasonable in amount, and the trustees of the will were therefore entitled to recover compensation from the widow's executors: *Haskell* v. *Marlow* (*c*).

Nothing turned, in *Haskell* v. *Marlow*, on the fact that the clause there was contained in a will and not in a lease, and it would have been easy for Salter J. to hold that since the widow had not made "seasonable applications of labour" in order to arrest the decay, the decay was not caused by "fair wear and tear." Had he done this, rather than basing his judgment on the fact that the excessive amount of disrepair was unreasonable and made the wear and tear "unfair," it would perhaps have been more difficult for the Court of Appeal to reach the decision which it did in *Taylor* v. *Webb* (*d*).

In that case, a landlord had covenanted with his tenant to keep the outside walls and roof of certain premises in tenantable repair "damage by fair wear and tear excepted"; owing solely to the effect of wind and rain, certain roofs and skylights became defective, and as they were not repaired, certain rooms, in due course, became uninhabitable and the tenant claimed damages for breach of the landlord's covenant to repair. The Court of Appeal held that the principle enunciated by Salter J. in *Haskell* v. *Marlow* was erroneous and that the question whether wear and

(*c*) [1928] 2 K.B. 45.
(*d*) [1937] 2 K.B. 283.

tear is reasonable is unaffected by the amount of the dilapidations. Scott L.J. (*e*) embarked upon an elaborate semantic exercise by analysing in detail the meaning of the word "fair." In his view the word "fair" and the alternative word which is just as commonly found, *i.e.*, "reasonable," connote not the amount of the user by the tenant of the premises but the nature of such user. In his view, if the tenant can establish that he, and those using the premises at his invitation or with his permission, have throughout used the premises in a fair and reasonable manner, he cannot be held liable for any of the consequences of disrepair, however dire and extreme. "The non-performance, even for a long period, of acts for which the covenantor was under no initial liability cannot create a liability" (*f*): *Haskell* v. *Marlow* was accordingly overruled.

It is curious to note that *Gutteridge* v. *Munyard* was not cited to the Court of Appeal in *Taylor* v. *Webb* and the *ratio* in *Taylor* v. *Webb* appears to be in direct conflict with the dictum of Tindal C.J. referred to above. The effect of the decision in *Taylor* v. *Webb* was, moreover, to nullify, in effect, any repairing covenant containing the "fair wear and tear" exception; to any action by the landlord for damages for dilapidations the tenant need only prove that he had not actively caused the dilapidations by some non-tenant-like user and he would succeed.

The position of such a tenant, therefore, became broadly equated with that of a yearly or weekly tenant whose obligation did not arise *ex contractu* but was implied by law. The position of such a tenant is illustrated by the case of *Warren* v. *Keen* (*g*). There, premises subject to the control of the Rent Restriction Acts had been let on a weekly tenancy and had fallen into disrepair. The landlord caused repairs to be executed and claimed the cost from the tenant, contending that it was an implied term of the tenancy that the tenant would use the premises in a tenant-like manner, would keep them wind and water tight, and would make fair and tenantable repairs thereto.

Somervell L.J. dealt first of all with the position of a tenant from year to year. Such a tenant is under an obligation, not to commit voluntary waste, and to use the premises in a tenant-like manner. There is also the authority of the judgment of Swinfen Eady L.J. in *Wedd* v. *Porter* (*h*) for the proposition that such a tenant must keep the premises "wind and water tight," and

(*e*) At pp. 303 and 304.
(*f*) *Per* Farwell J., at p. 308.
(*g*) [1954] 1 Q.B. 15.
(*h*) [1916] 2 K.B. 91. at 100.

in *Auworth* v. *Johnson* (*i*), Lord Tenterden suggested that such a tenant must "keep the premises in a little order." Somervell L.J. pointed out, however, that no case has been discovered where a tenant has been held liable for failure to keep wind and water tight where the damage would not be covered by the obligation not to commit voluntary waste or the obligation to use the premises in a tenant-like manner. "So," said Somervell L.J. (*k*), "whether there is an additional obligation of a limited kind with regard to repairs in the case of a tenant from year to year remains at any rate in a state of some doubt."

The Court of Appeal was, however, in no doubt that the implied obligation of a weekly tenant was different from and less onerous than the obligation of a yearly tenant. It seemed to Somervell L.J. absurd to suggest that a weekly tenant was under an obligation to do repairs which might well cost more than the rent, and although his tenancy might be determined by one week's (now under section 16 of the Rent Act, 1957, four weeks') notice. Denning L.J. (as he then was) frowned on the phrase "wind and water tight" which, in his view, is of doubtful value and should be avoided; the only obligation of a weekly (and possibly a yearly) tenant is to use the premises in a tenant-like manner. "He must, if he is going away for the winter, turn off the water and empty the boiler. He must clean the chimneys, when necessary, and also the windows. He must mend the electric light when it fuses. He must unstop the sink when it is blocked by his waste. In short, he must do the little jobs about the place which a reasonable tenant would do. In addition, he must, of course, not damage the house, wilfully or negligently; and he must see that his family and guests do not damage it: and if they do he must repair it. But apart from such things, if the house falls into disrepair through fair wear and tear or lapse of time, or for any reason not caused by him, then the tenant is not liable to repair it" (*l*).

In all material respects, therefore, the position of a tenant holding under an agreement containing a covenant with a "fair wear and tear" exception was the same as that of a weekly tenant whose obligations are implied by law. Such a state of things hardly seemed to be consonant with the intentions of the parties to a repairing lease, but thus matters stood until the case of *Brown* v. *Davies* came before the Court of Appeal in October, 1957. There, a tenancy agreement contained a covenant by the tenant "to use and occupy the premises in a fair and tenantable

(*i*) (1832) 5 C. & P. 239, at 240.
(*k*) At p. 18.
(*l*) Per Denning L.J., at p. 20.

manner and keep the interior clean and in good repair and condition and decorated except as to dilapidation or damage resulting from reasonable wear and tear" (*m*). From about 1952 until the beginning of 1957 the tenant did no internal decorations or repairs and the landlord claimed possession of the premises (which were rent-controlled) under section 3 of, and Schedule 1 (a) to, the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, on the ground that the tenant was in breach of his obligation to repair and decorate the premises. The county court judge held that the tenant was in breach of his obligations and accordingly made an order for possession and the tenant appealed.

It was contended by counsel for the tenant that the effect of the exception for reasonable wear and tear was, on the authority of *Taylor* v. *Webb*, to negative all the obligations contained in a repairing covenant which included such exception, unless it could be shown that the state of disrepair was due to some active or wilful damage done by the tenant as a tenant. Evershed M.R. (*n*) recognised that the consequence of such a submission would be to set at naught the dictum of Tindal C.J. in *Gutteridge* v. *Munyard* and was unable to conclude that the Court of Appeal in *Taylor* v. *Webb* intended to lay down a broad proposition inconsistent with that long-established dictum. The Master of the Rolls did not think it necessary or right that he should give an exposition of the exact scope of the exception for reasonable wear and tear; he did, however, put the matter in this way, that if proof is given that the tenant is not keeping the premises in a fair and tenantable manner and not keeping the interior clean and well repaired and decorated, "then, at the very least, the tenant must establish that the matters complained of ought to be attributed to dilapidation or damage resulting from reasonable wear and tear and to nothing else."

A concurring judgment was delivered by Romer L.J. who distinguished *Taylor* v. *Webb* on the footing that the covenant the court there had to construe was a landlord's covenant and not a tenant's, and on the footing that the case of *Gutteridge* v. *Munyard* had not been cited to the court. "Although it is true," said Romer L.J., "that the result for which counsel for the tenant contended in this case was that at which the court in

(*m*) The construction of such a covenant is now of particular importance in view of the necessity of calculating the "appropriate factor" under section 2 of the Rent Act, 1957, by which the basic rent of a controlled house may be increased. Such factor depends upon the measure of the responsibility of the landlord and tenant respectively for repairs, and such responsibility will necessarily be affected by the extent of the exemption arising from the "fair wear and tear" clause: see *Regis Property Co., Ltd.* v. *Dudley* [1958] 2 W.L.R. 356.

(*n*) At p. 825.

Taylor v. *Webb* arrived, I am quite clear that the decision had nothing like the general effect for which counsel contended. . . . The truth is that, in order to find out the scope and effect of a qualified covenant to repair, one has to look at the document as a whole, and it appears to me to be going far beyond anything that was said by any of the judges in *Taylor* v. *Webb* to say that you merely have to find an exception for reasonable wear and tear to reduce the scope of the covenant to practically nothing at all." The court, therefore, found that the tenant was in breach of his covenant to repair and that an order for possession was validly made against him.

It is, therefore, a matter of some moment that the law is rid of the inconvenience of the decision in *Taylor* v. *Webb*. One may now venture, perhaps, to re-state the rules relating to " fair wear and tear " exceptions in the light of the old law as revived by *Brown* v. *Davies* as follows:

(1) The extent of the tenant's obligations is a matter of the interpretation of the covenant to repair and the exception thereto in each case.

(2) If the landlord succeeds in proving dilapidations which prima facie amount to a breach of the covenant, then the burden passes to the tenant to prove that such dilapidations are within the exception.

(3) He is likely to succeed in proving this if he can establish—

(a) that the dilapidations were caused by normal human use or the normal action of the elements *and*

(b) that the dilapidations were caused despite his tenant-like care of the premises by " seasonable applications of labour " to them.

He will not succeed if he relies only on the fact that he pursued a policy of masterly inactivity over a considerable period of time.

THE RENT ACT, 1957—(5)

By Donald Keating, b.a., Barrister-at-Law
and
Christopher Priday, b.a., Barrister-at-Law

This is the last of a series of articles on the Rent Act, 1957. It is thought that at this stage no useful purpose would be served by a detailed examination of the provisions as to decontrol, first because before this article appears most readers will perforce have had to familiarise themselves with the decontrol provisions, second because those provisions, in contrast with the provisions affecting premises remaining controlled, are reasonably clear, and third because the provisions have already been summarised in the first of these articles (*a*).

On the other hand, since 1920 (*b*) it has been recognised that an essential element of the control of rents is a restriction upon the requiring of premiums by the landlord of controlled premises or the assignor of a controlled tenancy. The 1957 Act contains provisions which prevent the masking of a premium under the guise of a loan and impose a temporary ban upon premiums in respect of decontrolled tenancies. These provisions are noted below.

Premiums

The expression " premium " is not exhaustively defined in the Rent Acts and a full discussion of its meaning is not attempted here (*c*). It will suffice to recall the words of Warrington L.J. that it is " the capital value of the difference between the actual rent and the best rent that might otherwise be obtained " and " the purchase money which the tenant pays for the benefit which he gets under the lease " (*d*). The expression includes " any fine or other like sum and any other pecuniary addition to rent " (*e*). It has recently been held that, in the circumstances of the case, payment of rent in advance was a premium (*f*).

(*a*) See (1957) 21 Conv.(n.s.) pp. 262–264.
(*b*) See Act of 1920, s. 8.
(*c*) See *Megarry*, 8th ed., Chap. 9.
(*d*) *King* v. *Cadogan* (*Earl*) [1915] 3 K.B. 485, at pp. 413, 492.
(*e*) Act of 1949, s. 18 (2).
(*f*) *Grace Rymer Investments, Ltd.* v. *Waite* [1958] 2 W.L.R. 200.

Restrictions upon Premiums

The Landlord and Tenant (Rent Control) Act, 1949, makes it unlawful for a landlord to require the payment of a premium in addition to the rent " as a condition of the grant, renewal or continuance of a tenancy " to which the Rent Acts apply (*g*). Similarly, an assignor may not require the payment of a premium as a condition of the assignment of such a tenancy (*h*) unless it is the prescribed proportion of a premium lawfully paid before the commencement of the 1949 Act (*i*).

It should be remembered that the Rent Acts did not apply to a tenancy of a dwelling-house within the prescribed rateable value limits if the rent is less than two-thirds of the rateable value of the dwelling-house (*k*). Further, the Acts do not now apply to a tenancy granted for a term of years certain exceeding twenty-one years (*l*). Thus, it has always been permissible to require a premium for the grant or assignment of " a tenancy at a low rent " (*l*) and it now is permissible in the case of the grant or assignment of a " long tenancy " (*ll*).

Loans as Premiums

For a landlord or assignor to require the tenant to make a loan, whether secured or unsecured, as a condition of the grant, renewal, continuance or assignment of a tenancy to which the Rent Acts still apply is treated as the equivalent of the requiring of a premium (*m*). The provision does not invalidate any agreement for the making of such a loan or any security issued pursuant to such an agreement, but any sum so lent is repayable to the lender on demand, whatever may be the express term of the agreement (*n*).

It has been held that if a landlord requires the tenant to pay money to a third party such a payment is not the payment of a premium in the legal sense of the word (*o*). It is submitted, however, that this provision is wide enough to cover a forced loan, whether to the landlord or a third party.

(*g*) Act of 1949, s. 2 (1).
(*h*) *Ibid.*, s. 2 (2).
(*i*) Act of 1949, First Sched., Part II.
(*k*) Act of 1920, s. 12 (7).
(*l*) *i.e.*, at a rent less than two-thirds of the rateable value: see Landlord and Tenant Act, 1954, s. 2 (5).
(*ll*) For the statutory definitions of these phrases, used hereafter for convenience, see Landlord and Tenant Act, 1954, s. 2 (4) and (5).
(*m*) Act of 1957, s. 14 (1).
(*n*) *Ibid.*, s. 14 (2).
(*o*) *R.* v. *Birmingham* (*West*) *Rent Tribunal, ex p. Edgbaston Investment Trust, Ltd.* [1951] 2 K.B. 54.

Premiums and Rent in Advance in Respect of Decontrolled Tenancies

A tenancy is decontrolled by the 1957 Act either if the rateable value of the dwelling-house thereby let exceeds certain limits (*p*) or if the tenancy, although of premises whose rateable value is below these limits, comes into operation on or after July 6, 1957 (*q*). But until July 6, 1960, a landlord may not require the payment of a premium for the grant, renewal or continuance of a tenancy of premiums decontrolled by the 1957 Act, or which would in any event be excluded from the application of the Rent Acts because the rent payable is a low rent (*r*). Nor can a landlord avoid the effect of this temporary restriction by requiring the payment of rent in advance, since the Act makes void any requirement that rent shall be payable in advance before the beginning of the rental period in respect of which it is payable or, if the rental periods are more than six months in length, earlier than six months before the end of the rental period in respect of which it is payable. The requirement as to rent in advance is void whether it is imposed by a collateral agreement or under the terms of the tenancy agreement. Further rent payable for any rental period to which a requirement avoided by this provision relates, is irrecoverable from the tenant (*s*).

The practical result of this restriction is that the landlord is not fettered as to the amount of rent he may demand in respect of a decontrolled tenancy but he cannot, during the prescribed period, require the payment of a capital sum whether or not he makes any reduction from the market rent unless he is prepared to grant a long tenancy.

Similarly, until July 6, 1960, the assignor of a tenancy decontrolled by the 1957 Act, or which would have been decontrolled by the Act but for the fact that the Rent Acts did not apply as the rent was a low rent, cannot require the payment of a premium as a condition of the assignment of his tenancy (*t*). But he may do so if the proposed assignment is of a tenancy granted before July 6, 1957, which has not thereafter been renewed or continued and the rent payable under the tenancy is a low rent (*u*).

(Concluded)

(*p*) Act of 1957, s. 11 (1).
(*q*) *Ibid.*, s. 11 (2). The proviso should be noted.
(*r*) *Ibid.*, s. 13 (1). Note that a premium may still be charged for the renewal or continuance of a tenancy of premises not decontrolled by rateable value.
(*s*) *Ibid.*, s. 15 (1). It should be noted that this is an express statutory provision and exists independently of judicial reasoning that rent in advance may in some circumstances be a premium in any event—see note (*f*) *ante*, p. 98.
(*t*) *Ibid.*, s. 13 (1).
(*u*) *Ibid.*, proviso to s. 13 (1).

THE ENLARGEMENT OF LEASEHOLD TO FREEHOLD

By T. P. D. Taylor, ll.b., Solicitor.

Under certain conditions, not frequently encountered in modern practice, a term of years may be converted and enlarged into a fee simple estate of freehold. The conditions under which the enlargement may take place have their origin in Statute but are finally consolidated with certain amendments in section 153 of the Law of Property Act, 1925. The purpose of this article is to analyse the statutory device of enlargement and to attempt to resolve some of the problems which the section poses to the law of property in general.

1. Conditions for Enlargement

A term of years may be enlarged if the following conditions are complied with:—

(a) The term was originally granted for at least 300 years and 200 years must still be left to run at the date of enlargement (*a*).

The exact nature of the "term" to which the section extends is not limited by this condition or by any part of the section. Provided the term is to endure and does in fact endure for the appropriate periods, it may apparently arise under a lease or under-lease, mortgage (*b*), or settlement (*c*). While it might seem that a term would be within the section whether it subsists as a legal estate or equitable interest (*d*), this is not in fact the case, for it is provided by the section (*e*) that the person seeking to exercise the power must be (*inter alia*) "beneficially entitled in right of the term . . . to possession of any land comprised in the term" and an equitable owner—at any rate where the term is vested in trustees (*f*)—is entitled in right of the trust and not of the term, and to allow him to enlarge would bring an equitable interest on to the title.

At all events, if the term of years is one taking effect at law it must be a term of years absolute (*g*)—but under section 205

(*a*) s. 153 (1).
(*b*) See below, s. 153 (1) (a).
(*c*) If the person enlarging has power by the section: see subs. (6), below.
(*d*) See Law of Property Act, 1925, ss. 1 (4) and 149 (2).
(*e*) See below, s. 153 (6).
(*f*) See *Encyclopaedia of Forms and Precedents* (3rd ed.), Vol. 6, p. 451.
(*g*) Law of Property Act, 1925, s. 1 (1).

of the Law of Property Act, 1925, a term of years is absolute whether taking effect in possession or in reversion, whether or not at a rent, whether subject to other legal estates or not, and whether certain or determinable by notice, re-entry, operation of law, provision for cesser on redemption or any other event (other than dropping of a life) (*h*). In short, all terms of years taking effect at law for the appropriate periods required by the section are within its scope.

(b) There must be no trust or right of redemption affecting the term in favour of the freeholder or other person entitled in reversion expectant on the term (*i*).

A lease subject to a provision for cesser on redemption is still absolute for the purposes of the Law of Property Act, 1925 (*k*). Rights of redemption, however, usually involve the idea of a re-purchase by the person in whose favour they are made, and hence are usually referred to in connection with a mortgage. There is no apparent reason why section 153 should not of itself apply to terms of years expressed as mortgage terms, as was stated above, but from this requirement the right to redeem the mortgage must not be in existence. Thus, where the mortgage has been made irredeemable (*l*), the mortgage term would then qualify for enlargement under the section (*m*).

Whether or not the section applies to mortgage terms where the right of redemption is extinguished by lapse of time is resolved by section 88 of the Law of Property Act, 1925 (*n*). When a mortgagee of freehold land, whether by creation of a term of years absolute limited thereout or by a charge by way of legal mortgage (*o*), acquires a title under the Limitation Acts, he, or the persons deriving title under him, may enlarge the mortgage term into a fee simple under the statutory power for that purpose (*p*) discharged from any legal mortgage affected by the title so acquired, or, in the case of a charge by way of legal mortgage, he may by deed declare that the fee simple is vested in him discharged as aforesaid and the same vests accordingly. There is also a subsection of section 153 (*q*) which extends the section to "mortgage terms, where the right of

(*h*) *Ibid.*, s. 205 (1) (xxvii).
(*i*) s. 153 (1) (a).
(*k*) Law of Property Act, 1925, s. 205 (1) (xxvii).
(*l*) *e.g.*, as being a "debenture" by a company (*Knightsbridge Estate Co.* v. *Byrne* [1940] A.C. 613).
(*m*) See also *post*, p. 119, note (*k*).
(*n*) subs. (3).
(*o*) subs. (3) refers to "such mortgagee" and this incorporates the above reference in subs. (1).
(*p*) s. 153.
(*q*) subs. (3).

redemption is barred." The meaning of "barred" in this context is not clear, as the word is normally used in connection with the expression "barred by lapse of time." It is therefore open to argument whether "barred" here is in fact limited to cases where time has barred the right, or whether the use of the word on its own, coupled with the specific reference in section 88 to cases where title is acquired under the Limitation Acts, is such as to allow the word to extend to cases where the right to redeem is barred by agreement (*r*).

As a matter of practice, if in fact it is sought to enlarge a mortgage term where the right of redemption is extinguished by lapse of time, a statutory declaration should be made dealing with the acquisition of title under the Limitation Act, 1939. The mortgagee as a result of declaration and deed is in the same position as if a foreclosure order had been made.

(c) Either no rent is payable: or merely a peppercorn rent or other rent having no money value: or a monetary rent originally incident to the term has been released or barred by lapse of time, or otherwise ceased to be payable (*s*).

This provision, corresponding to the old enactment under the Conveyancing Act, 1881 (*t*), gave rise to several cases as to when a rent ceases to have a money value, *e.g.*, 3s. does not (or did not) even if irregularly paid (*u*); one silver penny "if lawfully demanded" does (*v*). The meaning of "barred by lapse of time" in connection with rent is also not clear. Under the Limitation Act, 1939, non-payment of rent does not of itself bar the rent by lapse of time, though arrears are not recoverable after six years (*w*). However, under section 153 a rent unpaid for twenty years (at least five being since January 1, 1926) under a lease otherwise enlargeable ceases to be payable if not in excess of £1 per annum (*a*): thereafter neither arrears nor future payments are recoverable (*b*). Independently of these provisions, however, a rent may be released either expressly by deed; or by implication, if it is "reasonably believed on reasonable grounds" that the rent has become released by non-payment over a long period, but no other guide exists as to what is a sufficient period, though seventy-four years has been

(*r*) Compare the use of the word "bar" in "barring the entail."
(*s*) s. 153 (1) (b).
(*t*) s. 65.
(*u*) *Re Smith & Stott* (1883) 29 Ch.D. 1009.
(*v*) *Re Chapman & Hobbs* (1885) 29 Ch.D. 1007.
(*w*) Compare rentcharges (12 years) and recovery of land (12 years).
(*a*) subs. (4).
(*b*) subs. (5).

held sufficient (*c*). If, however, there are reasonable grounds for such belief, a purchaser can be bound by a condition of sale in the contract to assume that non-payment over the particular period amounts to a release, so that enlargement under the statute would be effective. A description of property in this connection as "freehold" is therefore justifiable (*c*).

Finally, the definition of "rent" in section 205 of the Law of Property Act, 1925, while it includes "annual or periodical payment in money or money's worth, reserved or issuing out of or charged on land" does not include mortgage interest, nor anything in the nature of a premium or a fine (*d*). Hence, a lease granted at a lump sum consideration without rent is outside the scope of the above provision and does not of itself prevent the lease from being enlargeable. Any agreement regulating payment by instalments might render the instalments within the definition of "rent" mentioned above (*e*). In this connection, while rent reserved by a lease always passes with the reversion in the lease (*f*), a covenant to pay a fine by instalments does not normally (*g*) run with the reversion (*h*). Possibly, however, suitable clauses may be inserted in the later document so as to make the payments run with the reversion, as if rent, under the old common law rules.

(d) The term must not be liable to be terminated by re-entry for condition broken (*i*).

The scope of this requirement is not without its difficulties. It is not by any means certain as to the extent of the words "re-entry for condition broken." At common law, the right to re-enter (excluding denials of the landlord's title by the tenant) was implied where the obligation broken by the lessee was framed as a condition, whether the lease was by deed (*k*), or was merely in writing (*l*), and regardless of whether a forfeiture clause was or was not inserted. But if such obligations were framed as covenants, on breach of them the landlord has no right to forfeit the lease unless the right was expressly reserved by the lease (*m*), though in practice such a clause is usually inserted. Secondly, the definition of a term of years absolute under the Law of Property Act, 1925, makes a term absolute even if terminable by "notice

(*c*) *Blaiberg* v. *Keeves* [1906] 2 Ch. 175, decided under the Conveyancing Act, 1881, s. 65.
(*d*) Law of Property Act, 1925, s. 205 (1) (xxiii).
(*e*) Compare the position under the old Rent Acts.
(*f*) Law of Property Act, 1925, s. 141.
(*g*) See, *e.g.*, *Baker* v. *Gostling* (1834) 1 Bing.N.C. 19, *per* Tindal C.J.
(*h*) *Hill* v. *Booth* [1930] 1 K.B. 281.
(*i*) s. 153 (2) (i).
(*k*) *Doe d. Lockwood* v. *Clarke* (1807) 8 East 185.
(*l*) *Doe d. Henniker* v. *Whatt* (1828) 8 B. & C. 308, at 315.
(*m*) *Doe d. Willson* v. *Phillips* (1824) 2 Bing. 13.

or re-entry "; hence it would appear that a lease terminable by the landlord by notice at any time and otherwise enlargeable is not within this particular section. While it is possible that the courts would extend " conditions " to include covenants within the section, it is difficult to see how the problem of explaining away the latter anomaly can be circumvented without fresh legislative provisions.

By way of comparison with the above provision as well as with paragraph (c) above, section 5 of the Trustee Act, 1925, may be mentioned. This section empowers trustees to invest on mortgage of " property held for an unexpired term of not less than two hundred years, and not subject to a reservation of rent greater than a shilling a year, or to any right of redemption or to any condition for re-entry, except for non-payment of rent " (subs. 1). As these conditions are unlikely to appear in modern practice, it is possible that the legislature might have had enlargement in mind in allowing investment on mortgage of such leaseholds, but a rent of less than a shilling may, and a right of re-entry for non-payment of rent would, prevent enlargement under section 153.

(e) If the term was created by subdemise from a superior term, both must be enlargeable (*n*).

(f) The enlargement must be effected by deed: and must be effected by a person with power to enlarge—*i.e.*, either

(i) a person beneficially entitled in right of the term, whether or not subject to any incumbrance, to possession of land comprised in the term:

(ii) a person receiving income as trustee, in right of the term, or having the term vested in him on trust for sale, whether or not subject to any incumbrance:

(iii) a person in whom the term is vested as personal representative, whether or not subject to any incumbrance (*o*).

One or two points may be briefly noted here. Sub-paragraph (ii) includes all life tenants and statutory owners, who, since 1925, will have all leaseholds vested in them as trustees subject to the settlement: where a life tenant is beneficially entitled, he is also included under sub-paragraph (i). A mortgagor of a mortgage by demise may apparently enlarge even if the mortgagee is in possession: but a mortgagee cannot enlarge, as the equity of redemption still subsists (*p*). An equitable owner cannot enlarge either—at least where the term is vested in trustees (*q*).

(*n*) s. 153 (2) (ii).
(*o*) s. 153 (6).
(*p*) Subject to ss. 88 (3) and 153 (3), above.
(*q*) *Ante*, p. 101.

2. Effect of Enlargement

If all the foregoing conditions are complied with, a deed of enlargement may be executed by the person empowered to do so within paragraph (f) above. The concurrence of the landlord is not needed: the deed is a unilateral act by the tenant and purports to enlarge his term into the full estate in fee simple. Section 153 succinctly puts it: "Thereupon, by virtue of the deed and of this Act, the term shall become and be enlarged accordingly, and the person in whom the term was previously vested shall acquire and have in the land a fee simple instead of the term (*r*)."

The subsection makes no mention of the fate of the reversion as a result of the enlargement: though it provides that: "The estate in fee simple so acquired by enlargement shall be subject to all the same trusts, powers, executory limitations over, rights, and equities, and to all the same covenants and provisions relating to user and enjoyment, and to all the same obligations of every kind, as the term would have been subject if it had not been so enlarged" (*s*); and also provides that all mines and minerals not severed in right or in fact, or not severed or reserved by an inclosure Act or award, shall be included in the fee simple estate so acquired under the section (*t*). The effect of the above provisions is, therefore, a little obscure. The section appears to have received little consideration by the judiciary and not much more by the juridical, and it would therefore appear that the true effect of the section can only be gathered by comparing it in perspective with the rest of the law of property with which it is intended to coexist. Such examination may be fitted conveniently under two headings:—

(a) The term and the reversion.

(b) The incidents of the term.

(a) *The Term and the Reversion*

Since 1925, the only two estates capable of subsisting or of being conveyed at law are the estate in fee simple absolute in possession and the term of years absolute (*u*). It is also stated in the Law of Property Act, 1925, that a legal estate may subsist concurrently with or subject to any other legal estate in the same land as it could have done before 1926 (*v*), so that it would appear that the Act does nothing itself to assist in resolving the fate of the reversion.

(*r*) subs. (7).
(*s*) subs. (8).
(*t*) subs. (10).
(*u*) Law of Property Act, 1925, s. 1 (1).
(*v*) *Ibid.*, s. 1 (5).

There does not appear to be any judicial decision on the effect of section 153 on the reversion. There are simply the statements in subsections (7) and (8) that the original tenant acquires a fee simple instead of the term, but that such estate in fee simple shall be "subject to all the same . . . . rights, and equities . . . . and to all the same obligations of every kind, as the term would have been subject to if it had not been so enlarged." The section itself therfore does something to give the idea that, as the term would have been subject to a reversion before enlargement, so also is the enlarged fee simple. But how? Juridical opinion is scanty and divided. Some (*w*) have opined that the effect of creating a new fee simple is to bar the reversion in the same way that it is barred on a disentailing assurance, and most modern writers seem to tend this way: but all these opinions appear as mere expressions of opinion and no real or convincing reasons are advanced to show that such is the true position (*a*). The only other different juridical opinion so far advanced is that of Challis (*b*). Writing in 1911 on the corresponding subsections in the Conveyancing Act, 1881, he appeared to find the problem difficult to deal with at all. "On the one hand, two fees simple cannot, by the common law, subsist at the same time in the same lands: whence might be drawn the inference that the reversion is absolutely destroyed. On the other hand, the rule of the common law that a reversion in fee cannot be expectant on another fee may be suspended by force of a statute and it has, in fact, been so suspended by the Statute De Donis (*c*). The question does not appear to have been foreseen. The answer which by the analogy of the law it ought to receive is doubtful; and the answer which it in fact will receive cannot be predicted with confidence. If the reversion is not destroyed by the enlargement, the fee simple obtained by the enlargement will subsist as a base fee (*d*). No other example can be suggested of a base fee which is a fee simple absolute." After considering (*inter alia*) the provision in the Act of 1881 corresponding to subsection (8) of section 153 (*e*), he was prepared to concede that the provision "might well afford a reason for holding that the reversion remains still on foot, notwithstanding

(*w*) 20 Halsbury's *Statutes*, 761; *Wolstenholm and Cherry* (12th ed.), Vol. 1, p. 509; Megarry and Wade, *Law of Real Property*, 614.

(*a*) The argument being presumably that existence of a fee simple absolute in possession precludes the possibility of any reversion. As to this, see below.

(*b*) *Real Property* (3rd ed.), 334–335.

(*c*) This refers to estates tail. These are outside the statute *Quia Emptores*, 1289.

(*d*) This has been dismissed as being unconvincing—Megarry and Wade, *Law of Real Property*, 614.

(*e*) s. 65.

the determination of the term." Such an eminent authority as Challis, therefore, was not prepared to dismiss the possibility that the reversion might still continue to subsist.

As the purpose of this article is both to examine and to suggest, it is submitted that in fact the reversion is not destroyed by the enlargement and still subsists. The main objection to this is that no two estates for a fee simple can exist at common law in the same piece of land (*f*): many authorities exist on this point, and the existence of the rule cannot be ignored. But the rule may nevertheless be avoided, so that at least something must be capable of subsisting. First, as already mentioned, statute may itself provide an exception to rules previously subsisting at law, so that if the effect of section 153 (*g*) could be said to be to constitute an exception to the old rule, this could validly occur (*h*). Further, the various authorities at the base of the common law rule originated at least in part in the Statute Quia Emptores, 1289, "one of the pillars of the law of real property" (*i*).

Before 1290 when land was conveyed from A to B, a feudal tenure could be created between the parties, so that A and B respectively retained and acquired an estate in the property and the feudal relation of lord and tenant could be set up between them. This process, known as subinfeudation, was at the base of the old feudal system of landholding. Services and other obligations could be reserved as a result of such relation, and the burden of these would pass with the land. The statute forbade subinfeudation and provided that in future if A was the tenant of X and transferred his land to B, the tenurial relation passed from A, so that X and B were now lord and tenant; A dropped out. The statute applied, however, only where the land was "sold to be holden in fee simple" (*k*): it did not affect lesser estates of freehold, nor terms of years (then outside the feudal system). In all these cases, therefore, the relation could be created—though as leaseholds were never within the feudal system the landlord-tenant relation was not feudal—services, whether in cash (rent service) or kind, and also obligations, could be reserved and the benefit and burden of the rent and obligations could pass with reversion and land so far as they affected it. The statute therefore applied where there was a sale of land in fee simple. Accordingly, if, for example, A lets land to B for 2,000 years at a peppercorn

(*f*) Challis, *op. cit.*, *supra*.
(*g*) Or rather, the previous sections in the Conveyancing Act, 1881.
(*h*) See also *Re M'Naul* [1902] 1 Ir.R. 114.
(*i*) Megarry and Wade, *Law of Real Property*, 32.
(*k*) The literal words of the statute are "*istud statutu locu tenet de terris venditis tenendis in feodo simplr tantu. . . .*"

rent but for a lump sum consideration, there is a "sale" of the land by way of the grant of a term of years, and the statute does not apply and the landlord-tenant relation comes into existence. If the term is then enlarged by B, there is no element of sale (*l*) and no apparent reason why term and reversion should be united, as the concurrence of A to the enlargement is not required: a unilateral act by B suffices. It would seem, therefore, that a lease-and-enlargement effects a subinfeudation which is not within the terms of the Statute Quia Emptores, 1289, and can therefore occur quite validly. The effect of this can be seen below.

Enlargement, therefore, does not appear to extinguish everything remaining in the original holder of the fee simple reversion. What is left, however, is less clear. Before 1290, where a subinfeudation was effected under a grant of a fee simple estate, the grantor retained the right to the soil and the grantee took an estate in the land of a complementary nature to that of the grantor (*m*). It was irrelevant whether or not services, rent, or both, were reserved. If the lord-tenant relation arose, there was said to be a privity between the parties. Whether or not an actual reversion remained in the grantor was not clear, but there did remain a right of reverter in the shape of a right to the land by escheat if the heirs or descendants of the tenant failed. This right is regarded by some, *i.e.*, Lord Mansfield (*n*), as a strict reversion, but it amounted to sufficient privity with the grantee to carry the lord-tenant relation, and with it all rent, covenants and conditions concerning the land, to the respective assigns of grantor and grantee. ✓

In view of the historical derivations mentioned here, the interest left in the former reversionary landlord before enlargement must be a reversion or at least a right to reverter, but the exact nature is not clear. The difference, however, is quite important. The effect of enlargement upon the enlarged term could be quite peculiar. Under the Conveyancing Act provisions, if the reversion subsists with the enlarged term, it would appear that the enlarged term can subsist only as a base fee, so long as the landlord and his successors are alive—this is the view adopted by Challis, mentioned above. The Law of Property Act, 1925, will have done

(*l*) "The formation and completion of contracts for the conveyance of land or other hereditaments in consideration of a price in money"—Williams, *Vendor and Purchaser*, Vol. 1, p. 1. Enlargement involves neither change of money nor transfer of land.

(*m*) See Copinger and Munro, *Law of Rents*, Introduction.

(*n*) "The grant determined by the failure of heirs: the land returned as it did on the expiration of any, less temporary interest. It was no fruit, but the extinction of tenure, it was the fee returned." *Per* Lord Mansfield in *Burgess* v. *Wheate* (1759) 1 Wm.Bl. 123.

nothing to alter this position (*o*). Such a fee, apart from being subject to the machinery of the Settled Land Act, 1925 (which would necessitate a vesting deed, trustees, etc., if a sale was contemplated), would be an unattractive interest in the eyes of a purchaser. But, as it has been enacted (*p*) that, where an owner of a base fee remains in possession for twelve years after a protectorship has ceased (*q*), it would appear that the owner of an enlarged term would find his base fee automatically further enlarged into a fee simple absolute after twelve years' possession. A gift by will under section 176 of the Law of Property Act, 1925 (*r*), or mere acquisition of the reversion (*s*) would also automatically enlarge the base fee. It may be, however, that the intention of section 153 is to create a fee simple absolute in possession out of the enlarged term, regardless of whether or not the reversion subsists, and there is no reason in this respect why the section should not override the common law rule that a fee simple, subject to a reversion, can subsist only as a base fee. A further point here is that the effect of avoiding the Statute Quia Emptores, 1289, is to allow a fee simple absolute in possession to exist at law subject to a reversion or reverter.

If the interest remaining in the grantor is a reversion, it is not clear whether or not it can subsist at law. It was noted earlier that only the estate in fee simple absolute in possession can subsist at law since 1925 (*t*), and all other estates and interests are only equitable (*u*). Before enlargement, the reversion in fee simple was quite capable of subsisting at law, for the Act (*v*) provides that "possession" shall include the receipt of rents and profits or the right to receive the same. The tone of section 153 is rather against the prior receipt of rent of any monetary value from the land—providing as it does that the rent shall either be of no money value, or have been barred, or otherwise ceased to be payable (*w*). In view of the wide definition of "rent" in the Act (*a*) so as to cover any periodic sum reserved or issuing out of or charged on land, no type of income in this form is allowed to come from the land before enlargement can be effected,

(*o*) s. 1 (5).
(*p*) Limitation Act, 1939, s. 11.
(*q*) As the fee owner is in possession there cannot be a protector. This provision was originally for entailed interest.
(*r*) subss. (1) and (3).
(*s*) Fines and Recoveries Act, 1834, s. 39.
(*t*) Law of Property Act, 1925, s. 1 (1).
(*u*) *Ibid.*, s. 1 (3).
(*v*) s. 205 (1) (xix).
(*w*) subs. (1) (b).
(*a*) s. 205 (1) (xxiii).

though the section appears to allow covenants in the lease which may involve the payment of money or of benefit in kind to the lessor. At any rate, in the absence of some element of profit, it is difficult to see how the reversionary interest in the former lessor can continue to subsist at law, though formerly so capable, since it is not "in possession" within the Law of Property Act, 1925. As it is difficult to see how such reversion can be registered under the Land Charges Act, 1925 (*b*), a purchaser without notice for money or marriage would take free therefrom. On the other hand, however, the definition of "possession" in the Act extends to include the receipt of rents and profits and also the right to receive them even if none are payable. Consequently a fee simple reversion subject to a lease at no rent is still "in possession" since the right to receive still exists. As an enlargement, the section expressly provides that "all the same . . . rights, and equities . . . and all the same obligations of every kind" are still to subsist in the same way as they would if they affected the term, the right to receive rents and profits apparently continues to subsist even after enlargement, so that the reversion can still remain in possession even after enlargement.

There is, however, the slight academic possibility that the owner of the reversion might seek to reserve a rent out of the land after enlargement, with the prior concurrence of the former leaseholder. If this were to occur, one wonders whether, as it is still the common law rule that rent goes with the reversion (*c*), the rent reserved, since payable to the reversion, would by giving the reversioner a receipt of rents and profits, render the reversion "in possession" and so capable of subsisting once more at law. The rent would presumably be redeemable under section 191 of the Law of Property Act, 1925, as it is not reserved on a lease or tenancy.

If, however, the grantor's interest merely becomes a possibility of reverter, such possibility would appear to be subject to the perpetuity rule (*d*), though this raises the interesting point of what happens to the land if the prior interest is ever terminated (*e*). On the other hand, such possibility of reverter is an incident of the original lease, and may be extended by section 153 (8) to the enlarged term. *Quaere*, whether the rule that recognised incidents of leases are exempt from the perpetuity rule, coupled with section 153 (8), can be applied here (*f*). The point is unsettled.

(*b*) *e.g.*, an equitable easement (class D (iii)).

(*c*) Statutory as regards leases (Law of Property Act, 1925, s. 141).

(*d*) At any rate on a determinable fee (*Hopper* v. *Liverpool Corporation* (1944) 88 S.J. 213).

(*e*) See Megarry and Wade, *Law of Real Property*, 232, n. 18.

(*f*) See Gray, *Perpetuities*, § 303; Challis, 186; Megarry and Wade, *Law of Real Property*, 246.

Whether the interest left in the former landlord be a reversion or a right of reverter, the enlarged fee can still subsist at law. The only difficulty that can arise here is whether such a fee is absolute. Section 153 is of no help here as the words of subsection (7) refer only to a "fee simple." If the fee is not absolute, it must be subject to the Settled Land Act, 1925 (*g*). However, the Law of Property (Amendment) Act, 1926 (*h*), has provided that a fee simple subject to a legal or equitable right of entry or re-entry is for the purposes of this Act a fee simple absolute. As a fee subject to any kind of reverter or reversion must therefore, of necessity, be subject to a right of entry at some time, it would seem that the enlarged fee remains absolute in spite of the presence of the reversion.

(b) *The Incidents of the Term*

At first sight, there is no problem. By section 153 (8) the estate acquired is subject to "all the same trusts, powers, executory limitations over, rights, and equities, and to all the same covenants and provisions relating to user and enjoyment, and to all the same obligations of every kind, as the term would have been subject if it had been so enlarged." By subsection (10), mines and minerals, subject to certain limitations, mentioned above, also pass. One is tempted to stop and leave it at that. But, if interpreted literally, the effect of the subsection has been to allow the incorporation of the more flexible rules relating to leases into the more rigid rules governing estates of freeholds. An immediate example is the maintenance of the relation of landlord and tenant after enlargement. There appear, however, to be at least three points at which the rules governing freeholds and leaseholds may differ, and these may be conveniently noted.

(1) Enforceability of covenants by and against successors in title of the parties

The terms of the section say that the enlarged estate is subject to all the same covenants and provisions relating to user and enjoyment, and to all the same obligations of every kind, as affected the term. The word used is "term" not "lease." It has been opined that the section is restricted to restrictive covenants, but the whole wording used is against this limited interpretation. Before enlargement, the parties to the lease could sue and be sued

(*g*) As a base or determinable fee or as a fee subject to a contingency: see Settled Land Act, 1925, s. 1, as amended.
(*h*) Amending s. 7 (1) of the 1925 Act.

on all the covenants in the lease. Their successors, however, could sue and be sued only on those covenants "touching and concerning" the land; or, to use the more modern phrase, "having reference to the subject-matter of the lease." All such covenants were enforceable against assignees, whether positive or negative. The rule originated in the old principles existing before the Statute Quia Emptores, 1289, by which all provisions were enforceable against successors, if they touched and concerned the land and there was privity of estate between the parties. In the case of grants before 1290 by way of subinfeudation, this privity of estate was satisfied by the existence of the estate of the grantee and the reversion or reverter of the grantor. When the Statute forbade subinfeudation, it destroyed the right of the grantor and severed the privity between grantor and grantee. The effect of this was that by destroying the estate upon which the covenants affecting the land could attach, the covenants became personal, and could not burden the land so as to affect a successor of the grantee, though an equitable exception in restrictive covenants later arose under the rule in *Tulk* v. *Moxhay* (*i*). As, however, the statute did not apply to the terms of years, when leases attained full legal status, the old rules relating to privity of estate affected the term of years; hence, we have the foundation of the modern rules relating to covenants in leases.

Applying section 153 (8), therefore, its effect must at least be to make the burden of positive covenants which touch and concern the land enforceable against successors in title of the grantee, and if in fact the effect of enlargement is to cause an unwitting and accidental subinfeudation, the subsection will at the least be fulfilling the old common law conditions outlined above. This conception would appear to be confirmed by the words of the section, "covenants and provisions . . . as affected the term," as the term would be subject to the rules relating to privity of estate prior to enlargement. Challis, writing in 1911 (*k*), noted that enlargement had been "used by some conveyancers as a device whereby to annex to a fee simple certain covenants which would not 'run with the land' at the common law" and thought this to be "more than plausible." To extend the section further, however, would be to run counter to the general law governing the assignment of choses in action, under which the burden of a covenant is not assignable under such law at all if it is personal and does not touch and concern the land. It may be added that such a burden would never have affected the term on

(*i*) See Megarry and Wade, *Law of Real Property*, 683–691.
(*k*) Challis, *Real Property* (3rd ed.), 334–335.

assignments thereof; an express identical covenant would have to be entered into.

(2) Restrictions on alienation

A condition of this nature, forbidding subsequent transfers of the land in question, or part thereof, is treated differently in law according to whether the land be freehold or leasehold, and according to whether the disposition sought to be effected is voluntary or involuntary.

A restriction against future alienation of freehold land or any part thereof may operate by way of limitation or condition. In the case of the former, a grant of land to a person "until he shall so dispose of it" operates as a fee simple determinable. The terminating event need not be limited to the perpetuity period though it is uncertain whether or not the rule against perpetuities applies to the grantor's possibility of reverter (*l*). But a grant of freehold land to a person "on condition" that he shall not dispose of it must comply with the rule, or the right of re-entry is destroyed and the fee becomes absolute. However, notwithstanding the rule, a total restriction on the alienation of the land is void as being repugnant to the ownership granted; a partial restriction is void if, and only if, it "substantially" takes away the power to alienate (*m*). The question, however, of when a restraint becomes total and ceases to be partial, or vice versa, is one of great difficulty, causing great uncertainty in practice.

In the case of a provision seeking to evade the bankruptcy laws, and made on the occasion of a freehold alienation, the restriction as to the operation outside the perpetuity period is similar to the above, but applies whether the restriction be by way of limitation or condition: though a restriction by way of condition will be void in any event as being repugnant to the grant. Protective or discretionary trusts are the usual form here.

The use of these restrictions was limited by the 1925 legislation, in that fees terminable by limitation or condition were not "absolute" and could therefore exist only in equity (*n*) under a strict settlement (*o*). However, it is provided that a fee simple liable to be divested by statute or subject to a legal or equitable right of entry or re-entry is still absolute for purposes of the Law of Property Act, 1925 (*p*); though reputed to be intended to cover

(*l*) See Megarry and Wade, *Law of Real Property*, 231–232.
(*m*) See Jenks, 33 L.Q.R. 11.
(*n*) Law of Property Act, 1925, s. 1 (3).
(*o*) Settled Land Act, 1925, s. 1 (1) (ii) (c).
(*p*) s. 7 (1), as amended by the 1926 Act.

only cases where a rent charge is protected by right of entry, the section in its amended form is clearly wider than this.

In leases, however, a provision that the lessee will not, during the term " assign, underlet or otherwise part with the possession or control " of the land or buildings demised to him is perfectly valid. It may be created by way of covenant or condition, the latter implying a right of re-entry or breach thereof. The provision appears to be valid whatever the length of the term: for the tenant always has an estate which is capable of being alienated (*q*), and a transfer of that estate will be valid *qua* the transferor, the former tenant. A breach of the provision, however, may give rise to an action for damages and in the event of a right of re-entry being either expressly annexed or implied, the lease may be determined. The provision, however, is subject to certain restrictions where the words " without consent " are added to the prohibition (*r*). It is sometimes better today to insert an absolute prohibition. This can then be waived when desired and on any terms thought fit (this does not prejudice the operation of the covenant thereafter) (*s*). Alternatively, an express proviso can be added to the covenant against transfer without consent, whereby before asking for consent the tenant shall offer in writing to the landlord to surrender his interest in the land; for, if the offer be accepted, the lease is ended and no question of consent can therefore arise (*t*).

If a lease capable of being enlarged and containing the provision is in fact enlarged, it would appear that, if the foregoing be taken literally, there is an estate in fee simple which may not be assigned and which is valid at law. Care should be taken to ensure that the prohibition refers to the " term " rather than the " lease," for it is possible to argue that as the lease no longer exists, a provision referring to the " term " is nugatory, whereas if the word " term " is used, subsection (8) can be invoked to prevent this construction. Whether or not the Landlord and Tenant Act, 1927, will continue to apply is unsettled, but probably its effect could be incorporated as being a " right " or " equity " within the meaning of subsection (8). One cannot see how the perpetuity rule can apply here, as prior to the enlargement the provision was incident to the lease, and its effect is presumably continued by subsection (8).

(*q*) *Parker* v. *Jones* [1910] 2 Ch. 32, at 38.

(*r*) Law of Property Act, 1925, s. 144, and Landlord and Tenant Act, 1927, s. 19.

(*s*) Law of Property Act, 1925, s. 148.

(*t*) *Adler* v. *Upper Grosvenor Street Investments, Ltd.* [1957] 1 W.L.R. 227

(3) Termination of the grantee's interest

It has already been noted that the estate in fee simple absolute cannot be destroyed at law except possibly by a breach of condition where the fee simple is subject to a right of entry or re-entry for breach thereof (*u*). If the position is otherwise the estate is not absolute within the Law of Property Act, 1925. It has also been stated in the Act, however, that a term of years absolute is absolute whether " certain or liable to determination by notice, re-entry, operation of law . . . " (*v*) and whether or not at a rent (*w*). A lease for a fixed period, however, cannot be terminated by notice unless expressly agreed.

If a provision allowing termination of the lease by notice appears in a lease capable of enlargement, it is respectfully submitted that the term is still enlargeable. There are two possible provisions to consider—

(i) *That " there must be no trust or right of redemption affecting the term . . . "* (*a*). It is unlikely that a clause providing for notice to terminate the lease can cause an infringement to this requirement. No express trust exists nor does a resulting or constructive trust appear to. The word " redemption " usually involves the idea of a repurchase by the mortgagor or chargor of an interest previously mortgaged or charged, and, as neither element arises here and no value changes hands for the exercise of the notice, the idea of a redemption being satisfied by a notice of termination is not, it is submitted, feasible in the circumstances.

(ii) *That " the term must not be liable to be terminated by re-entry for condition broken "* (*b*). The basis of the argument that a clause allowing termination of the lease would not be a contravention of the above requirement, lies in the definition of the word " term." " Term of years absolute " includes a term " liable to be terminated by notice, re-entry. . . . " A distinction is therefore made between notice and re-entry. Even accepting that " notice " does not mean notice by the grantor, the fact remains that a clause allowing a notice to terminate the lease does not of itself render that lease incapable of being enlarged, if the words of the Act are to be taken at what would seem to be their literal value.

It would accordingly seem that clauses allowing a tenant to terminate his lease by a notice, or by surrender accepted by the

(*u*) Law of Property Act, 1925, s. 7 (1), *supra*.
(*v*) s. 205 (1) (xxvii).
(*w*) *Ibid*.
(*a*) *Ibid*., s. 153 (1) (a).
(*b*) *Ibid*., s. 153 (2) (i).

landlord (*c*), do not invalidate the eligibility of a lease to be enlarged into a fee simple. If section 153 (8) is to be taken at its face value, they remain valid even after enlargement. We then have the unique spectacle of a fee simple terminable by the tenant, a kind of determinable fee but with a difference. Is the resulting fee simple invalid at law as not being absolute? And if not, can it be said to be subject to a settlement (*d*)? All these questions remain unanswerable until there is judicial authority on the subject, though it seems unlikely that the legislature intended a settlement to arise from an enlargement. But then, as it is hoped this article shows, so many peculiar points arise on this section that one does begin to wonder what, in fact, the legislature did intend. It seems, however, that if the estate acquired is "subject to all the same . . . rights . . . and to all the same obligations of every kind," then if the term was a legal estate, then so also is the fee simple, as the term of years before it was subject to all the rights and obligations affecting legal estates.

(4) Other provisions

The effect of section 153 (8), broadly speaking, is to unify the characteristics of leases and fees simple where a lease is enlarged, the former to prevail over the latter in the event of conflict. The exact extent of this is uncertain, but it seems that, although there are doubts, there are also possibilities for the bold, though the tradition of conveyancers to evade existing law is fast waning in the face of increasing statute-law.

3. Enlargements and Conveyancing

Here the following points may be briefly noted where enlargements are under scrutiny:—

(1) Root of title

It is unlikely that a deed of enlargement can be a good root of title. Shortly, it is well known that a good root of title is one which gives an accurate description of the property and effects a dealing with the whole legal and equitable title; and, which may be appreciated on further thought, is normally made on an occasion on which it is usual to investigate the title. The deed is made only by one person, the lessee; and as the lessee cannot normally call for the freehold title but may well be affected with constructive notice of a title where the lessor has no title (as distinct from a

(*c*) As in *Adler's* case, *supra*.
(*d*) See Settled Land Act, 1925, s. 1 (1) (ii) (c) and s. 117 (1) (iii).

defective title), no client could be advised to accept the deed as a satisfactory root of title.

(2) Registration of deeds or of title

(i) It would seem that the deed of enlargement should be registered in a Local Deeds Registry, as a legal estate is created by it.

(ii) Where, however, the original lease relates to land registrable under the Land Registration Act, 1925, the parcels in the deed of enlargement should describe the land by its registered title. Upon production of this deed to the Land Registry a note of the determination of the leasehold interest is made on the Register (*e*). The new fee simple owner can apparently apply to the Registrar to be registered as the owner of the freehold title (*f*).

(3) Generally

A declaration of enlargement ought not to be included in the same deed as a lease or assignment of the term, as the person expressed to acquire the enlarged estate is he "in whom the term was previously vested" (*g*).

(4) Stamp duty

The duty normally payable on a deed of enlargement is 10s. (*h*). As this appears to cover the case of a mortgage term, the right

(*e*) Under the Land Registration Rules, 1925, r. 200: see *Encyclopaedia of Forms and Precedents* (3rd ed.), Vol. VI, 460 (m). The following questions may be posed here:—

(i) Whether this procedure can lawfully be continued if in the case of unregistered land it is true that the old reversion subsists under a sub-infeudation.

(ii) What is the position where the former lease contains an absolute prohibition against assignment or parting with possession or similar restrictions on dealings? Such a lease is not registrable under the Act nor are any dealings in connection with it (Land Registration Act, 1925, s. 8 (2); Land Registration Rules, 1925, r. 45). If, therefore, it can be stated validly that an enlargement merely creates a fee simple, and passes no estate from one person to another, then it is not a "conveyance or assignment" of land and is not registrable under the Act; further, it is not an assurance of land, so that a breach of the prohibition is not committed. Hence, a conveyance by a lease-and-enlargement, the lease being of the kind above, appears to create a non-registrable, but quite legal, estate in fee simple.

(iii) What is the position where the person enlarging alienates in breach of the prohibition, and, the person for whose benefit the prohibition is made, waives the breach? Since a particular waiver no longer amounts to a general waiver, subject to a contrary intention (Law of Property Act, 1925, s. 148), a lease-and-enlargement following upon the previous assignment, any breach being waived, is definitely not registrable. *Quaere*, whether any later dealing with such an enlarged lease, by conveyance or otherwise, is registrable.

(*f*) Under the Land Registration Rules, 1925, r. 131. *Encyclopaedia of Forms and Precedents* (3rd ed.), Vol. VI, 452, 460 (m). *Quaere*, whether this applies if the answer in r. 92 (i) is in the affirmative, and in any event.

(*g*) s. 153 (7).

(*h*) Stamp Act, 1891, s. 62: Alpe, *Stamp Duties* (24th ed.), 183.

of redemption of which is "barred" (*i*), an interesting hypothesis can be put forward. If the meaning of "barred" here can be construed as extending to a bar not merely by lapse of time but by an agreement or arrangement, then a mortgage of land, made irredeemable expressly (*k*), the term of which is subsequently enlarged into a fee simple, may escape conveyance or transfer duty, paying instead mortgage debenture duty on the mortgage and a deed stamp on enlargement. As between companies and individuals, this method may, therefore, be applied to reduce duty.

4. Enlargements—Practical Limits

The device of converting long terms into freeholds by enlargement is used in the main at the present time for the following purposes:—

(a) Where lands demised by way of mortgage and the right of redemption has been foreclosed, or barred by the mortgagee taking possession and holding for the statutory period without giving any acknowledgment—to clarify the title of the mortgagee.

(b) Where, by a settlement, a term has been created to raise portions and has been sold to the trustees—to confirm their title and to make up a fee simple estate.

(c) Where a long term of years exists and it is practically impossible that evidence of title to the reversion exists: and where even if it did exist, the value of the reversion must be very small at enlargement—to avoid the lapse of time occasioned by the reversion till expiration of the lease and later running of time to acquire a title by possession.

While it will be clear that there are possibilities in the method, however, it should be clear that the doubts and difficulties are almost as numerous as the possibilities. There are, in addition, "the practical difficulties of explaining to a purchaser and, even more, to his mortgagee the mechanics of a method of conveying land reminiscent if not of feoffment, with livery of seisin, at any rate of lease and release" (*l*). If, however, any of the old tradition survives in modern conveyancing, it is hoped that the foregoing pages may kindle interest sufficient to override the difficulties and doubts, so as to avoid at least some of the limitations of the present land law.

(*i*) s. 153 (3).

(*k*) *e.g.*, as a company debenture (see *ante*). Alternatively as between individuals it may work if the element of mutuality is present, *e.g.*, "I will never redeem if you never call in."

(*l*) George, *Sale of Flats*, 8. See also (1955) 19 Conv.(N.S.) 411.

A DECISION ON THE NEW STREETS ACT, 1951

By Harold Parrish, ll.b., Barrister-at-law

Two interesting questions under the New Streets Act, 1951, were raised recently in the case of *Cruse* v. *Tidswell* before the Yorkshire Quarter Sessions a report of which is appended to this article.

The first question was how far a notice under section 2 of the Act of the determination of the amount of a payment or security in respect of private street works required in respect of any building for which plans have been deposited and approved continues in force in respect of plans subsequently deposited and approved for a different building on the same site.

This question may arise where there has been a deposit and approval of one set of plans for a building which will have a frontage on the street or where two or more sets of plans for alternative buildings have been deposited and approved at the same time for erection on the same site having a frontage on the street. Section 2 (1) of the Act in either case requires the local authority within one month after the plans of the building deposited in accordance with building by-laws have been passed to serve a notice on the person by whom or on whose behalf the plans were deposited requiring the payment or the securing under section 1 of the Act of a sum specified in the notice.

As soon as a proper notice is served, section 1 operates to prohibit any work for the purpose of erecting any building for which plans are required to be deposited until the payment of the sum or the giving of the security. That section provides that " where it is proposed to erect any building for which plans are required to be deposited with the local authority in accordance with building by-laws and the building will have a frontage on a private street, no work shall be done for the purpose of erecting the building unless the owner . . . has paid to the local authority or secured to the satisfaction of the authority the payment to them of such sum as may be required under the next following section in respect of the cost of street works in that street."

Where there are two or more sets of plans the local authority does not know which building will be erected but it does know that it is proposed to erect within section 1 a building for which plans are required to be deposited and all the authority need do to give force

to section 1 is to serve a notice under section 2 within one month after the plans of the building deposited have been passed, that is after the passing of plans of any building which it is proposed to erect under section 1 for which plans are required to be deposited.

Henceforward, there is a prohibition of work for the erection of any building, for which plans are required to be deposited on the frontage unless the sum required is paid or secured as the case may be.

If later a new set of plans is deposited and approved for erection of a different building on the same frontage the prohibition still applies because the proposed building is within section 1 and the prohibition can only cease if the requirement of the payment of a sum or giving of a security has ceased to have effect. There is, however, no provision in the Act for a requirement of a payment or security to cease to have effect (apart from the provisions for exemption from the Act in the amending Act of 1957) except as provided by section 4 of the Act of 1951; and that section provides that where the amount to be paid or secured under section 1 of the Act has been determined under section 2 and subsequently (a) the local authority has declared the deposit of the plans shall be of no effect or (b) before any work has been done for the purpose of erecting the building the owner gives notice to the local authority of his intention not to proceed with the building, the determination shall, unless street works have been carried out for which the owner of the building will be liable, be of no effect for the purposes of the Act. Such a notice by the owner of his intention not to proceed with the building must, it seems, be a notice with respect to building on the frontage under any of the plans deposited and approved and, under section 4 (3), on the owner giving notice of his intention to proceed with the building under any of the plans deposited or approved, the notice requiring the payment or security under section 2 of the Act must be given by the local authority within one month of the notice by the owner of his intention to proceed and section 2 is to have effect accordingly. The owner is therefore still bound by the prohibition under section 1 because he may not do any work until a payment is made or security is given under section 2 and section 2 has effect so as to enable the local authority to serve a notice under section 2 as provided by section 4.

The second question which arose was whether the local authority who are required, in their notice requiring a deposit or security under section 2 of the Act, to specify such sum as in their opinion would be recoverable under the appropriate private street works code in respect of the frontage of the proposed building on the private street, must have regard to benefit derived under the Private Street

Works Act, 1892, where that Act applies, or whether they may base their opinion entirely on the question of frontage.

This question seems to have arisen out of a misapprehension of the law. It is plain from the section that the amount is that which would be recoverable in respect of frontage and frontage only but the frontage liability under the Act of 1892 includes a liability on a frontage basis having regard to benefit derived or work done if the local authority resolve under section 10 of the Act to have regard to such matters; see *Parkstone Primrose Laundry, Ltd.* v. *Poole Corporation* (1950) 114 J.P. 354.

The local authority should therefore in forming their opinion consider the question of benefit derived or work done but it is a matter of opinion, and it would not be difficult to justify a sum not based on benefit derived. Whether the local authority have regard to benefit derived is a matter purely within the discretion of the local authority. When considering the matter under section 2 of the Act of 1951 an appeal to the Minister may be made under subsection (4) of that section and when the local authority come to make up the street under the Private Street Works Act, 1892, no objection can be made to their decision not to have regard to benefit derived but an appeal may be made by way of memorial to the Minister.

Cruse v. Tidswell

West Riding of Yorkshire Quarter Sessions Appeal Committee

Chairman: His Honour Judge D. O. McKee and other Justices

January 13, 1958

The appellant, an architect, had been convicted by a magistrates' court for an offence under the New Streets Act, 1951, s. 1 (2), in that he, being a person undertaking the erection of a building, did work in or for the purpose of erecting the building without the owner of the land on which the building was to be erected having paid to the local authority such sum as was required by the authority by notice served pursuant to section 2 (1) of the New Streets Act, 1951. The appellant had obtained all necessary permission for a building in 1955, and notice had been served on him under section 2 (1) requiring the owner to pay or secure £170. The intention to build was then abandoned, but in 1956 plans for a different building on the same site were submitted and all necessary permission obtained. No fresh notice under section 2 (1) was served, no sum was paid or secured by the owner, and the appellant had started to build.

Held, dismissing the appeal, that the New Streets Act concerned frontage, not buildings. The notice under section 2 (1), therefore, applied to all plans for buildings on the same site provided the frontage remained the same. Further, the reference in section 2 (2) of the Act to "the appropriate Private Street Works Code" was not to be taken necessarily as a reference to the Private Street Works Act, 1892, s. 10.

Appeal against a decision of the Pudsey Borough Magistrates' Court given on October 2, 1957, whereby the appellant was convicted of an offence under section 1 (2) of the New Streets Act, 1951, in that he, being a person undertaking the erection of a building, did work in and for the purpose of erecting the building without the owner of the land on which the building was to be erected or a previous owner having paid to the local authority or secured to the satisfaction of the authority the payment to them of such sum as was required by the authority by notice served pursuant to section 2 (1) of the New Streets Act, 1951. The appellant was fined £10 and ordered to pay £10 towards the costs of the prosecution.

It was proved or admitted that: The appellant was an architect and acting as such and as agent for the then owners of a plot of land fronting on to a street which was not then made up, he submitted to the local authority an application for by-law and planning permission in respect of a dwelling-house the plans for which were submitted with the said application. On August 16, 1955, the local authority gave notice approving the plans under the by-laws and on August 17, 1955, the local authority gave notice of planning approval. On August 18, 1955, a notice was served on the appellant pursuant to section 2 (1) of the New Streets Act, 1951, requiring the owner of the said plot to pay or secure the sum of £170.

Thereafter it was decided to go no farther with the proposed building and in or about October, 1956, a further set of plans was submitted by the appellant as architect. The said plans related to an entirely different dwelling-house on the same site. On October 18, 1956, the local authority gave by-law approval of the said plans, which were referred to by an index number different from that of the original plans, and on the same day the local authority gave notice of planning approval in respect of the said plans. No fresh notice under the New Streets Act, 1951, was served in respect of the new plans.

On January, 26, 1957, the local authority, having decided to commence street works in the said street, served notices of provisional apportionment on the owner of the plot, under the Private Street Works Act, 1892. On July 8, 1957, the appellant served on the local authority a notice to inspect the commencement of building of the dwelling-house approved in October, 1956. Shortly thereafter building of the said dwelling-house commenced; at the said time of commencement, the street works were substantially complete.

G. F. Mason, for the appellant, argued that it was a condition precedent of liability under the New Streets Act, 1951, that the local authority should serve a notice under section 2 (1). Such notice relates to the plans of the building which have been submitted and attaches so to speak to the building and not to the site. If after plans have been submitted and notice served, fresh plans are submitted, it is the duty of the local authority to serve a fresh notice in respect of the building covered by the fresh plans. It is only an offence under section 1 (2) for work to be done in or for the purpose of erecting the building in respect of the plans of which the notice under section 2 (1) has been served. Here the building was a building different in type and cost from that covered by the approval given in August, 1955, and was the subject of different plans and different approval (that of October, 1956). There had therefore been no offence under the section.

C. E. Scholefield for the respondent, the Town Clerk of the Borough of Pudsey, argued that in assessing the amount required to be paid or secured before building on the site could begin, the local authority had only to consider frontage; once, therefore, plans of a building had been submitted, and a notice under section 2 (1) given, such notice remained in force and covered all subsequent plans for buildings on the same site provided that the frontage remained the same. There was, therefore, no need for the authority to serve a second notice after the submission of the second set of plans had been submitted and approval given in October, 1956, and the erection of the building covered by the new plans was an offence.

It was not relevant that at the time the erection of the building began provisional apportionment notices under the Private Street Works Act, 1892, had been served and the street works had been substantially completed, since the object of the New Streets Act, 1951, was not simply to provide for the payment of a deposit, but to provide for such payment by a person more likely to be able to pay than the person liable for payment under the Private Street Works Act, 1892.

Judge D. O. McKee.—In this case, Mr. Mason submitted that the notice referred to in section 2 (1) of the New Streets Act, 1951, covers buildings and not sites. He ably elaborated this argument, and that section 2 (2) imported the adoption of the Private Street Works Act, 1892, into this Act; as under section 10 of the Private Street Works Act, 1892, the local authority may, if it thinks right, take into account various factors apart from frontage such as, for example, degree of benefit and user, the position should be the

same under this Act when deciding what the appropriate deposit should be. The answer to this is, we think:

(1) In the New Streets Act itself. Frontage and frontage only is referred to. The Act does not say that the provisions of the 1892 Act are incorporated into this Act. Nor is section 2 (2) apt to incorporate such provisions into this Act. We are not certain that when section 2 (2) refers to " the appropriate private street works code " it is referring to section 10 of the Private Street Works Act, 1892, at all. If this is right, the local authority were under no duty to consider the second set of plans nor to serve a fresh notice in respect of such plans because the matters such as degree of benefit were not material.

(2) There was nothing whatsoever to prevent the appellant putting in four plans at the same time for the same site, and he would have got approval of all of them. What do the local authority do then? They are surely not to be expected to require a different payment in respect of each plan. In our judgment, all that the New Streets Act, 1951, relates to is frontage.

The appeal therefore fails. We think that the justices were right in convicting, but the point appears to us to be highly technical and it has taken some hours when conducted by counsel to resolve. . . . It does not seem to us that the action of this appellant deserves any penalty whatever. We propose, therefore, to give the appellant an absolute discharge and there will be no order as to costs.

Solicitors—Kathleen Stephens and Featherman, Leeds, for the appellant; the Town Clerk of Pudsey.

[*Reported by G. F. Peter Mason, Barrister-at-Law.*]

PROBLEMS ON THE VARIATION OF SHAREHOLDERS' CLASS RIGHTS

By D. G. Rice, M.A., LL.B., PH.D., Barrister-at-Law

At the time an issue of a particular class of shares is made the rights attached thereto are regarded as subsisting permanently. However, in our complex and ever-changing commercial world, for numerous reasons it often becomes desirable, if not obligatory, to vary from time to time the rights of that class. It is the purpose of this article to consider (a) the means whereby this may be done and (b) the safeguards that are available against any unfair or oppressive variation. It is perhaps surprising that what would seem to be of paramount importance to our economic life and of every-day occurrence should be hedged around with uncertainty and doubt. We shall attempt, therefore, in this examination to evolve from the authorities a coherent set of rules. For simplicity of analysis we will consider separately the two problems set out above, confining throughout our attention exclusively to variations arising otherwise than on a reconstruction or amalgamation.

(A) The Means Whereby Class Rights may be Varied

How can class rights be varied? The answer to this question depends upon where the class rights are set out; for they may be contained in either (i) the memorandum or (ii) the articles of association. Let us begin by considering the first possibility, *viz.*, that the memorandum lays down the rights to be enjoyed by the different classes of shareholders. How can these rights be modified? For example, can they be directly modified by a special resolution passed by the company in general meeting? To this question the authorities give a clear answer in the negative. "If the memorandum prescribes the classes of shares into which the capital is to be divided and the rights to be attached to such shares respectively, the company has no power to alter that provision by special resolution" (*a*). "A special resolution cannot alter the memorandum in any way" (*b*). Moreover, although

(*a*) *Per* Lord Thankerton in *Campbell* v. *Rofe* [1933] A.C. 91, at p. 98.
(*b*) *Per* Cotton L.J. in *Guinness* v. *Land Corpn. of Ireland* (1882) 22 Ch.D. 349 (C.A.). See also Fry L.J. in *Ashbury* v. *Watson* (1885) 30 Ch.D. 376 (C.A.); Cozens-Hardy J. in *Underwood* v. *London Music Hall* [1901] 2 Ch. 309, at p. 313; and Vaughan-Williams L.J. in *Re Welsbach Incandescent Gas Light Co.* [1904] 1 Ch. 87 (C.A.), at p. 96.

section 23 of the Companies Act, 1948, gives power to alter conditions in the memorandum if they could have been contained in the articles, subsection (2) expressly provides that: "This section . . . shall not authorise any variation or abrogation of the special rights of any class of members." It is clear, then, that, where class rights are contained in the memorandum of association, they are incapable of direct alteration by means of a special resolution.

Furthermore, they cannot be indirectly altered by additions to or modifications of the articles. For where the memorandum is at variance with the articles, the former will prevail (*c*). Admittedly, the two Scots cases—*Re Oban & Aultmore, Glenlivet Distilleries* (*d*) and *Re Marshall, Fleming & Co.* (*e*)—are authority for the view that class rights set out in the memorandum can be modified by articles filed contemporaneously with the memorandum. However, no support can be derived from these cases for an extension of the principle to cover conflicts that have only arisen after alteration of the articles.

Although class rights as set out in the memorandum cannot be modified directly or indirectly, there is nevertheless nothing to prevent the memorandum itself making provision for modification, and in this event the rights may be altered in the manner and to the extent so provided (*f*). But on the basis that the memorandum contains no such power (*g*) the class rights there set out are incapable of alteration so long as the company continues in its existing form. Admittedly, on a reconstruction variation of class rights can be effected under section 206 of the Companies Act, 1948 (*h*), but such operations as these lie outside the scope of this article.

We must next consider what is the position where class rights are set out, not in the memorandum, but in the articles of association. In fact, that is the place where they are usually to be found (*i*). Now, when class rights are contained in the articles, how can they be modified? Must resort be had to section 206, or are there other methods of effecting a modification? Normally

(*c*) *Ashbury Ry. Carriage & Iron Co.* v. *Riche* (1875) L.R. 7 H.L. 653. at p. 671; *Guinness* v. *Land Corpn. of Ireland, supra*, at p. 381. *Cf. Re Peveril Gold Mines* [1898] 1 Ch. 122 (C.A.).

(*d*) (1903) 5 F.(Ct. of Sess.) 1140.

(*e*) 1938 S.C. 873.

(*f*) *Underwood* v. *London Music Hall, supra*; *Re Welsbach Incandescent Gas Light Co., supra.*

(*g*) Of course, it is not possible subsequently to rectify this omission by means of a special resolution.

(*h*) See *Re Palace Hotel* [1912] 2 Ch. 438; *Re Schweppes, Ltd.* [1914] 1 Ch. 322 (C.A.); and *Re J. A. Nordberg* [1915] 2 Ch. 439.

(*i*) See Lindley L.J. in *Andrews* v. *Gas Meter Co.* [1897] 1 Ch. 361 (C.A.), at p. 370.

the articles themselves will make provision for the alteration of class rights through the machinery of a "variation of rights" clause (*j*), *i.e.*, a clause under which class rights may be varied subject to the sanction of a stated majority of members of the class concerned. Thus, under article 4 of the 1948 Table A class rights may be modified "with consent in writing of the holders of three-fourths of the issued shares of that class, or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of the shares of that class." However, the articles of association will not necessarily contain a "variation of rights" clause. Accordingly, we must consider the problems relating to variations of class rights both where there is a "variation of rights" clause and where there is not.

Where the articles contain a "variation of rights" clause

Where a company's articles of association contain a "variation of rights" clause and class rights are modified in accordance with its terms, generally no problem arises. So long as there is no contravention of the safeguards provided by the common law and section 72 (*k*) of the Companies Act, 1948 (*l*), no difficulty presents itself.

Suppose, however, the company, without reference to the "variation of rights" clause, purports simply to modify those articles which directly govern class rights. Is such a modification effective? For example, suppose a company, one of whose articles provides that the preference shareholders shall receive a cumulative preference dividend of 6 per cent. per annum, attempts to alter that article by special resolution, so that the dividend is reduced to 5 per cent. Will the courts uphold such a modification by itself or will they also require the alteration to be subject to the terms of the "variation of rights" clause? Surprisingly enough, there is no direct authority on this extremely important point. We will, therefore, consider the problem on basic principles and in the light of what authority does exist. The argument for the view that the company may modify class rights merely by directly altering the relevant articles without reference to the provisions of the "variation of rights" clause, can be based on

(*j*) It is to be noted, however, that compliance with the provisions of a "variation of rights" clause does not release the company from the necessity of also passing a special resolution to alter those articles which define the class rights concerned.

(*k*) Corresponding to s. 61 of the 1929 Act.

(*l*) Discussed in Part (B).

the unqualified terms of section 10 (*m*) of the Companies Act, 1948, and on certain dicta in *Andrews* v. *Gas Meter Co.* (*n*), *Re Australian Estates & Mortgage Co.* (*o*) and *Campbell* v. *Rofe* (*p*), which we will cite again later (*q*), when we consider the same problem in relation to articles that do not contain a "variation of rights" clause. All these authorities suggest that a company is always free to alter its articles, it being immaterial whether the article to be altered relates to class rights. Moreover, in support of this view it is arguable that, if a company wishes to prevent class rights being varied by means of alterations to the articles *simpliciter*, it can always make provision in the memorandum that class rights shall only be modified subject to the terms and conditions contained in the "variation of rights" clause.

However, against the above view there are two powerful arguments which suggest that, where there is a "variation of rights" clause, modifications can only be effected subject to its provisions. First, there is the wording of section 72. This section provides that, if the rights attached to a particular class of shares are modified in accordance with the terms of a "variation of rights" clause, "the holders of not less in the aggregate than 15 per cent. of the issued shares of that class . . . may apply to the court to have the variation cancelled." The object of this section is, of course, to protect the rights of the minority members of a particular class from being prejudiced. Now, if it is the policy of the legislature to give to the minority members of a particular class protection over and above that already afforded by the stringent provisions of a "variation of rights" clause, provisions which restrict to the class concerned the exclusive power to modify the rights belonging to that class, how much the more must it be the legislature's intention to give similar protection against special resolutions passed by the ordinary members who, of course, need not necessarily be the particular class of shareholders whose rights are involved! However, the phraseology of section 72 suggests that its protection is only effective where modifications are carried out in accordance with the terms of a "variation of rights" clause. The inevitable inference is that the only way in which the Act contemplated class rights being modified, where a "variation of rights" clause existed, was in accordance with the terms of that "variation of rights" clause. Thus, in the wording

(*m*) Reproducing s. 10 of the 1929 Act, s. 13 (1) of the 1908 Act and s. 50 of the 1862 Act.
(*n*) *Supra*.
(*o*) [1910] 1 Ch. 414.
(*p*) *Supra*.
(*q*) *Infra*, at p. 133.

of section 72 there is a suggestion that, where a company's articles of association contain a " variation of rights " clause, class rights cannot be modified simply by alterations to the relevant articles by means of special resolutions. Modifications can only be effected subject to the terms of the " variation of rights " clause.

Our second argument for the view that class rights cannot be varied without reference to the " variation of rights " clause depends upon the principle implicit in those cases dealing with what constitutes a " variation " of class rights. For these cases (*r*) clearly show that, where a proposed action involves a true variation of class rights and the articles include a " variation of rights " clause, the rights can only be altered subject to the terms of that clause. Thus, in *White* v. *Bristol Aeroplane Co.* (*s*) and *Re John Smith's Tadcaster Brewery* (*t*), where it was sought to make a new issue of shares ranking pari passu with the original shares, it was accepted without argument that, if the issue of such shares did involve a variation of class rights, it could only be effected subject to the terms of the " variation of rights " clause contained in the articles of association. The fact that the new issue was held not to involve a variation of class rights did not affect this principle. Now as the alteration of an article governing class rights is in effect clearly a variation of class rights, then it follows, according to the principle accepted in the above cases, that such an alteration can only be carried out if the terms of the " variation of rights " clause are fulfilled. In other words, class rights can only be modified subject to the provisions of the " variation of rights " clause.

It is submitted, then, that, although section 10 and various dicta suggest that a company is free to alter class rights without reference to the " variation of rights " clause by simply passing a special resolution altering those articles of association that govern class rights, this view cannot stand in the light of the two contrary arguments propounded above. It is submitted that the better opinion is that, where the articles contain a " variation of rights " clause, class rights can only be modified if the terms of that clause are fulfilled (*u*).

(*r*) See *Re MacKenzie & Co.* [1916] 2 Ch. 450; *Greenhalgh* v. *Arderne Cinemas, Ltd.* [1946] 1 All E.R. 512 (C.A.); *White* v. *Bristol Aeroplane Co.* [1953] Ch. 65 (C.A.); *Re John Smith's Tadcaster Brewery* [1953] Ch. 308 (C.A.).

(*s*) *Supra.*

(*t*) *Supra.*

(*u*) It is possible to reconcile with this conclusion the authorities suggesting the opposite view if we distinguish between (i) the alterability of the articles and (ii) the enforceability of the articles as altered. It is arguable that, although a company is free to alter without reference to the " variation of rights " clause, any article dealing with class rights, such an alteration is unenforceable. However, granted that such a distinction will serve to reconcile the two conflicting viewpoints,

Although we have concluded so far that the modification of class rights cannot be effected simply by the alteration of the articles governing such rights but that it also requires compliance with the terms of the "variation of rights" clause, it remains for us to consider one other possible means of altering class rights. Can a company, by special resolution, first alter the article which sets out the "variation of rights" clause, and then modify class rights in accordance with the terms of this clause as amended? Or to exploit the idea further, can a company delete the clause altogether? Once again there is no authority on this point. It is submitted, however, that any alteration to the "variation of rights" clause will require, not merely a special resolution of the company in general meeting, but also compliance with the terms of this clause in its original form. For the alteration will constitute a variation of a class right, in that the particular class or classes, whose rights are rendered subject to variation on different conditions from those obtaining under the original "variation of rights" clause, will have suffered an infringement of an especially important class right, the right that their privileges shall only be varied in accordance with the terms of the clause in its original form: and, if the alteration to the clause constitutes a variation of a class right, it follows from our previous conclusion that the clause in question can only be modified subject to its own provisions. Of course, this rule will apply *a fortiori* where the company seeks to delete the clause altogether without complying with its terms.

Where the articles do not contain a "variation of rights" clause

We must now consider the position where no "variation of rights" clause exists. Two questions inevitably arise: (i) can a company modify class rights by first inserting such a clause in its articles of association and then acting in accordance with the powers thereby conferred (*uu*), and (ii) can a company modify class rights simply by altering those articles which directly govern them? We will consider each question in turn. As regards the first, there is an authority suggesting that the answer is in the affirmative. In *Re National Dwellings Society* (*v*) the articles of association of a company did not give power to modify rights, or to divide shares, or to reduce capital. The company thereupon

it is doubtful whether it is of any practical importance. The vital point is that, where there is a "variation of rights" clause, class rights can only be varied subject to the provisions of that clause.

(*uu*) See, however, *supra*, note (*j*) at p. 128.

(*v*) (1898) 78 L.T. 144.

added new articles conferring the necessary powers. The company then put forward a scheme for capital reduction, involving an alteration of class rights. The scheme was approved by a majority of each class of shareholders in accordance with the provisions of the new articles of association, and on a petition to the court for approval the court confirmed the scheme. Prima facie, then, *Re National Dwellings Society* (*v*) suggests that a company is free to modify class rights by first incorporating a " variation of rights " clause in its articles of association and then acting in accordance with the powers thereby conferred. However, two factors must be borne in mind. First, in this case the petition was unopposed. Had objections been raised, it is possible that the result might have been different. Secondly, in cases involving the reduction of capital, the court has, under section 66 of the Companies Act, 1948 (*w*), an absolute discretion as to whether it will give its consent. Therefore, if the insertion of the new article giving the company power to modify class rights was invalid, the court still had power to approve the reduction. Therefore, *Re National Dwellings Society* (*v*) is an inconclusive authority for the view that a company may always insert a " variation of rights " clause in its articles of association to enable it to modify class rights. However, it is difficult to see why the company should not enjoy this power. Protection against any unreasonable terms there might be in such a clause is afforded by sections 72 and 210 and the common law.

We must now consider whether a company can vary class rights by directly altering by special resolution those articles which set them out. Now, when we considered this problem where a " variation of rights " clause existed, we concluded that any direct alteration of the relevant articles would constitute a variation of class rights, and such a variation could only be effected subject to the terms of the " variation of rights " clause. This argument will, of course, now no longer apply, there being no " variation of rights " clause with whose terms the alteration might accord. Can these rights, therefore, be modified by alteration to the articles directly governing them?

Section 10 of the Companies Act, 1948, provides that " Subject to the provisions of this Act and to the conditions contained in the memorandum, a company may by special resolution alter or add to its articles." Therefore, it is submitted that prima facie a company ought to be free to alter any article, even though it define class rights. There is no clear decision to support this view, but numerous dicta can be cited. Thus, in *Andrews* v. *Gas Meter*

(*w*) Reproducing s. 55 of the 1929 Act.

Co. (*x*), although the specific point at issue was the company's right to alter the articles to give power to issue preference shares, Lindley L.J. discussed the problem on a wider basis than was strictly required by the question to be resolved. He expressed the view (*a*) that:

> "... the rights of the shareholders in respect of their shares ... are matters to be regulated by the articles of association rather than by the memorandum, and are, therefore, matters which (unless provided for by the memorandum, as in *Ashbury* v. *Watson* (*b*)) may be determined by the company from time to time by special resolution pursuant to section 50 (*c*) of the Act."

Again, in *Re Australian Estates & Mortgage Co.* (*d*) Neville J. said (*e*):

> "I think that so far as the preference between the shareholders depends upon their rights under the articles and not under the memorandum, those rights can be modified in the same way that the articles themselves can be modified."

Finally, if we look at *Campbell* v. *Rofe* (*f*) we find in the words of Lord Thankerton similar confirmation that an article setting out class rights can be modified by a special resolution. For the learned Lord of Appeal observed (*g*):

> "While the memorandum must state the amount of capital, divided into shares of a certain fixed amount, provision as to the character of the shares and rights to be attached to them is more properly made by the articles of association which may be altered from time to time by special resolution of the company."

Thus, the dicta in *Andrews* v. *Gas Meter Co.* (*h*), *Re Australian Estates & Mortgage Co.* (*d*) and *Campbell* v. *Rofe* (*f*), clearly support the view that, where class rights are contained in the articles of association, the company is still free to alter its articles, and thereby modify such rights. Further, this view accords with section 10, and if in fact it is desired to ensure that there shall be no alteration of class rights by virtue of a modification of the articles of association by a special resolution, a clause to that effect

(*x*) *Supra.*
(*b*) *Supra.*
(*d*) *Supra.*
(*f*) *Supra.*
(*g*) At p. 98
(*h*) *Supra.*

(*a*) At p. 370.
(*c*) Now s. 10.
(*e*) At p. 424.

can always be inserted in the memorandum, or alternatively the class rights themselves can be set out in the memorandum.

So far all that has been said suggests that a company can modify class rights simply by altering the particular articles which define them. Unfortunately, everything is not quite so simple and one-sided as might first appear. Four arguments can be adduced supporting the contrary view. First, there are certain dicta in *Allen* v. *Gold Reefs of West Africa* (*i*) seeming to suggest that class rights cannot be modified by mere alterations to the articles of association. These dicta are not altogether easy of interpretation, particularly as Romer L.J. seems to take an even more extreme view than his brethren on the Bench (*k*). However, a second argument of far more telling effect may be adduced from the implication inherent in the view that class rights may be freely varied by a simple alteration of the articles. For the consequence of this view is that a member is better protected where the articles of association contain a " variation of rights " clause than where they do not. For we have concluded that, if the articles of association expressly provide for the alteration of class rights by the incorporation of a " variation of rights " clause, these rights can only be modified subject to the strict conditions of that clause, but that if the articles make no provision at all for the variation of class rights, the shareholders of each class are entirely at the mercy of the looser requirements of a special resolution. For, whereas a " variation of rights " clause will normally prescribe that class rights shall be modified only subject to the sanction of a specified majority of the shareholders of the class concerned, a special resolution merely requires a three-quarters' majority (voting in person or by proxy) of the company in general meeting, which means, in practice, of the ordinary shareholders, and these latter are not necessarily the actual class concerned and may, in all likelihood, have interests divorced from those of the particular class whose rights are affected. If, then, our conclusions so far are correct, we reach the surprising result that, where the articles of association make no provision at all for the modification of class rights, a member of a particular class is in a worse position than he would be if the articles had, in fact, incorporated a normal " variation of rights " clause expressly providing for alteration of class rights. The inequity of this result challenges the validity of one of our conclusions, *viz.*, that a company may, where a

(*i*) [1900] 1 Ch. 656 (C.A.), at pp. 674, 676 and 679.

(*k*) *viz.*, that not merely are such alterations of the articles unenforceable, but are not even capable of being carried out in the first place.

" variation of rights " clause does not exist, modify class rights by merely altering the particular articles which govern them.

A third argument for the view that class rights cannot be varied, where there is no " variation of rights " clause, merely by alterations to the articles, is suggested by the wording of section 72. As has been said above, the phraseology of section 72 implies that the protection afforded to minorities by that section will only apply where a modification is effected in accordance with the terms of a " variation of rights " clause and, if no such clause exists, apparently the safeguards of the section will be inapplicable. Now, clearly it cannot have been the intention of the Legislature to give a minority better protection where there is a " variation of rights " clause than where there is not. It would seem the Legislature did not contemplate that class rights would be modified in the absence of a " variation of rights " clause. Thus, the wording of section 72 gives support for the view that class rights cannot be modified merely by alteration of the articles of association. Further, a fourth and final argument can be found in the force of professional opinion. There is certainly a widespread belief among practitioners that in the absence of a " variation of rights " clause class rights cannot be modified.

We see, then, that, although the dicta expressed in such cases as *Allen* v. *Gold Reefs of West Africa* (*l*), *Re Australian Estates & Mortgage Co.* (*m*) and *Campbell* v. *Rofe* (*n*), support the view that, where the articles do not contain a " variation of rights " clause, class rights can be modified simply by alterations to the articles governing them, and although these dicta find additional support in (a) section 10, and (b) the company's power to provide in the memorandum against alterations if so desired, nevertheless we find considerable authority for the contrary view in (i) the dicta of *Allen* v. *Gold Reefs of West Africa* (*l*), (ii) the inequitable effect of giving greater protection to a member where there is a " variation of rights " clause than where there is none, (iii) the wording of section 72, and (iv) the force of professional opinion. Although the dicta contained in *Allen* v. *Gold Reefs of West Africa* (*l*) are not perhaps decisive in their meaning, the full effect of arguments (ii), (iii) and (iv) remain undisturbed. It is submitted, however, that despite the impact of these three arguments, on balance the weight of authority supports the view that, where there is no " variation of rights " clause, class rights can be modified merely by alterations to those articles which directly govern them. A potential subscriber to an issue should be warned that, where the articles of association

(*l*) *Supra.* (*m*) *Supra.*
(*n*) *Supra.*

make no express provision for variations of class rights, such rights are in fact not inviolable, but subject to modification on the passing of a special resolution. In other words " variation of rights " clauses are not enabling but restrictive. However, it may well be that, if and when the matter comes to be decided by the courts, they will apply the protection afforded to a minority by section 72 in favour of minorities whose class rights have been affected by the passing of a special resolution.

[*To be concluded*]

GOODS OR LAND?

By A. H. Hudson, Barrister-at-Law

The Statute of Frauds was too much with us and it was too much to hope that all the problems it was instrumental in proliferating would vanish at one stroke. Since section 40 of the Law of Property Act, 1925, remains unrepealed it still remains an important question whether a sale of the vegetable produce of the soil whilst still standing in the soil is a sale of goods only or a sale of land. In the first case no special formalities are necessary but in the second either a memorandum in writing or part performance must be proved. The problem was known from a comparatively early date in the history of the Statute of Frauds owing to the different types of formalities prescribed by section 4, which included land, and section 17, which dealt with sale of goods. In spite of the age of the problem, however, curiously conflicting statements appear in leading textbooks as to its probable solution. Thus, Cheshire and Fifoot, *Law of Contract*, 4th ed., p. 156, Benjamin on *Sale*, 8th ed., p. 189, and Atiyah, *Sale of Goods*, p. 28, all suggest that, as a result of the definition of "goods" in section 62 of the Sale of Goods Act, which reads: "'Goods' includes . . . emblements and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale": any sale of the standing produce of the soil which will result in that produce being severed, no matter how long after the formation of the contract, is a sale of goods and consequently does not require any special formalities for enforceability.

On the other hand, Sutton and Shannon on *Contracts*, 5th ed., p. 138, dissent strongly from this view, making the point that the definition in the Sale of Goods Act is for the purposes of that Act alone, and think that a contract may be both a contract for the sale of goods and a contract for the sale of land within section 40 and that in such a case it would be necessary to satisfy the requirements of section 40 as to formalities. Their point, that the definitions in section 62 of the Sale of Goods Act only operate for the purposes of that Act, may be reinforced by the fact that the opening words of that section read: "In this Act . . ." This is not inconsistent, at any rate, with their suggested limitation of operation. The view that a contract may simultaneously be a contract for the sale of goods and of land commended itself to the author of an article

in 93 L.J. 259 and also to Megarry and Wade, *Real Property*, p. 512. They say "Inconvenient as this result may be, there is no necessary impossibility about it." Dart, *Vendor and Purchaser*, 8th ed., p. 207, and Anson, *Contract*, 20th ed., p. 71, are clearly of the opinion that the Sale of Goods Act has not made the revolutionary change suggested in the first three works cited. Smith and Thomas, *Casebook on Contract*, p. 474, regard the Cheshire and Fifoot solution as "not unattractive" but do not appear to be convinced. They say that a contract by which one party is to acquire rights to things growing over a period of time on the other's land would seem to be capable of being interpreted as a contract for a "right, privilege, or benefit in, over, or derived from land"; which fall within the definition of "land" in section 205 (ix) of the Law of Property Act, 1925. They also say that *Morgan* v. *Russell & Sons* [1909] 1 K.B. 357 reveals one exception to the general application of the Sale of Goods Act to "things attached to or forming part of the land." It may perhaps be remarked that this point is somewhat weakened so far as sales of crops are concerned because Walton J. expressly distinguished the slag which was the subject-matter of the sale in that case from the ordinary vegetable produce of the soil: see p. 366. They say that in the event of any conflict between the Sale of Goods Act and the Law of Property Act, the latter, being the more recent Act, will prevail. Their conclusion is that "it would be premature to assume that the old common law learning is already obsolete."

Thus the majority of writers, supported by weighty reasons of principle, appear to be opposed to the view that the Sale of Goods Act has made any extraordinary change in the law relating to the sale of the produce of the soil, and therefore think it necessary to have recourse to the pre-1893 case law to determine whether a particular sale is a sale of an interest in land or not.

Unfortunately, that case law does not give one sure test. Lord Abinger C.B. said in *Rodwell* v. *Phillips* (*a*): ". . . no general rule is laid down in any one of them [the cases] that is not contradicted by some other." However, it is suggested that a clue to this labyrinth may be found in the fact that the general judicial approach to the Statute of Frauds and its re-enactments has been to confine the operation of these provisions within as narrow a field as possible. Therefore it seems reasonable to predict that the courts will prefer those tests which will, consistently with authority, keep as many transactions as possible out of the ambit of section 40 of the Law of Property Act. Hence, it would seem very likely

(*a*) (1842) 9 M. & W. 501, at p. 505.

that, despite the doubts expressed by Sutton and Shannon, at p. 137, it would be held that a contract for the sale of standing *fructus industriales* is always a contract for the sale of goods. In regard to *fructus naturales* it appears that two main tests have been suggested for ascertaining whether a sale of such produce of the soil is a sale of goods only or a sale of land. The first depends upon the time when property passes. If the property passes immediately, before severance, then there is a sale of an interest in land, whereas if the property is not to pass until severance then it is a sale of goods. The second test is to ask, are the crops intended to obtain further benefit from remaining in the soil after the making of the contract? If so, then the sale is a sale of land but if they are not intended to benefit then it is a mere sale of goods.

It is obvious that the second test will bring more transactions out of the scope of section 40 than the first; hence, in the light of the normal judicial approach to these provisions, it is suggested that the second will be preferred. The result—that *fructus industriales* are always merely goods and that *fructus naturales* only amount to an interest in land when it is intended that they shall derive further benefit from the soil after they have been sold—coincides with the decision in *Marshall* v. *Green* (*b*), the last and certainly the best known of the pre-1893 cases. If it be objected that the non-adoption of the first test would mean a strained interpretation of section 205 (ix) of the Law of Property Act, it might be replied that well-established canons of construction ("that Parliament is presumed to know the law") could be applied to achieve this result and the strain in the case of *fructus naturales* would in any case be no greater than in the case of standing *fructus industriales*, which no one, except Sutton and Shannon, doubts are goods. It would be a minor feat compared to some other devices that have been brought into play to curb the Statute of Frauds and its progeny.

Finally, there seems to be little judicial guidance on this topic. Parker J., however, would seem to have adopted the Cheshire and Fifoot–Benjamin approach to the operation of section 62 of the Sale of Goods Act in *Jones* v. *Tankerville* (*c*), but the Judicial Committee in *Kauri Timber* v. *Taxes Commr.* (*d*) and the Court of Appeal in *Stephenson* v. *Thompson* (*e*) (a case on the Bills of Sale Act, 1878) appeared to think that the test in *Marshall* v. *Green* had not been affected.

(*b*) (1875) 1 C.P.D. 35.
(*c*) [1909] 2 Ch. 440, at p. 445.
(*d*) [1913] A.C. 771, at p. 779.
(*e*) [1924] 2 K.B. 240.

NOTES OF RECENT CASES

1. *REAL PROPERTY AND CONVEYANCING*

By F. R. Crane, ll.b., Solicitor

District Bank, Ltd. v. *Webb and others*
[1958] 1 W.L.R. 148; [1958] 1 All E.R. 126 (Ch.D.)

Conveyance—recital of unincumbered seisin—existence of lease—whether estoppel against mortgagee.—In February, 1952, land and premises were conveyed to A and B (husband and wife), who in March, 1952, demised the property to A and C for twenty-one years. In July, 1954, A and B executed a memorandum of deposit to secure B's account and in the following October D (a brother of B) did the same though he had then no interest in the property. In November, 1954, A and B conveyed the property to D, who made a charge by way of legal mortgage to the Bank in 1955. A and B were residing in the property under the lease (C, a former partner of A's, had dropped out and claimed no beneficial interest). The Bank now sought possession under the legal charge.

Prima facie, of course, the legal lease had priority to the legal mortgage by virtue of its earlier creation. The Bank argued, however, that A and B were estopped by virtue of a recital in the conveyance of November, 1954, that they as vendors were "seised in unincumbered fee simple in possession upon trust for sale." Danckwerts J., however, decided against the Bank. He held, first, that an unambiguous representation is necessary to create an estoppel and that "incumbrance" was more appropriate to a charge than a tenancy. The meaning of "incumbrance" is admittedly uncertain (see Emmet on *Title*, 14th ed., Vol. 1, pp. 412–413) but it is submitted that the present decision must be limited to the particular point of estoppel, and does not, for example, affect the rule that a vendor contracts to give vacant possession unless the contrary is stated (*Cook* v. *Taylor* [1942] Ch. 349) and must disclose tenancies (*Caballero* v. *Henty* (1874) L.R. 9 Ch.App. 447).

Danckwerts J. held, secondly, that the words "in possession" in the recital referred merely to an estate in possession as opposed to one in remainder. With respect, this seems to be clearly correct, but may be contrasted with the learned judge's remarks in *Grace Rymer Investments, Ltd.* v. *Waite*, noted below.

Finally, Danckwerts J. said that had it been necessary he would have held the Bank fixed with notice of the lease from their local manager's general knowledge of the property and of the frequent dealings between the various parties. For an earlier example of the need for alertness on the part of a bank manager, see *National Provincial Bank* v. *Jackson* (1886) 33 Ch.D. 1.

Gorulnick v. *Gorulnick* [1958] 2 W.L.R. 58; [1958] 1 All E.R. 146 (C.A.)

Matrimonial home—wife as proprietor—whether able to exclude husband after petition for divorce—Married Women's Property Act, 1882, *s.* 12.—A wife, who owned the matrimonial home and had presented a disputed petition for divorce on the ground of cruelty, sought an injunction restraining her husband, who had not left the home, from living or remaining there. The Court of Appeal (Hodson and Morris L.JJ.) held (1) a wife cannot as of proprietary right exclude her husband from the matrimonial home owned by her, because he has the right to consortium (considering the Married Women's Property Act, 1882, s. 12; *Symonds* v. *Hallett* (1883) 24 Ch.D. 346; *Shipman* v. *Shipman* [1924] 2 Ch. 140); (2) the above cases show that the court has a discretion to exclude a husband, especially one who has forfeited the right to consortium by his own acts (even if the home is his—*Silverstone* v. *Silverstone* [1953] P. 174); (3) in the present case the judge at first instance (Wallington J.) had exercised his discretion against the wife on proper principles and his decision should stand.

2. *TRUSTS*

By F. R. Crane, ll.b., Solicitor

Grey v. *Inland Revenue Commissioners* [1958] 2 W.L.R. 168; [1958] 1 All E.R. 246 (Ch.D.)

Oughtred v. *Inland Revenue Commissioners* [1958] 2 W.L.R. 174; [1958] 1 All E.R. 252 (Ch.D.)

Trusts of equitable interests in personalty—creation—directions to trustees—constructive trusts—whether writing required—Law of Property Act, 1925, *s.* 53.—These two cases decided by Upjohn J. both arose out of claims for stamp duty, but are noted here because they are of general application to assignments and trusts of equitable interests in personalty.

The Law of Property Act, 1925, by section 53 (1) (a) and (b), requires assignments of interests in land to be made in writing, and trusts of land to be "manifested and proved" by writing or by will. Section 53 (1) (c) provides that "a disposition of an equitable interest or trust subsisting at the time of disposition must be in writing signed by the person disposing of the same or his agent thereunto lawfully authorised or by will." Section 53 (2) reads: "This section does not affect the creation or operation of resulting implied or constructive trusts." Furthermore, a trust of personalty may be declared orally (Lewin on *Trusts*, 15th ed., p. 42).

Equity will not perfect an imperfect gift. To create a completely constituted trust or a gift of a legal interest in property the donor must either transfer the legal title or declare himself a trustee (*Milroy* v. *Lord* (1862) 4 De G.F. & J. 264; *Richards* v. *Delbridge*

(1874) L.R. 18 Eq. 11); an imperfect transfer is not to be construed as a declaration of trust (*Milroy* v. *Lord, supra*) but if the donor has done all he can to divest himself of the legal title and only some formality (*e.g.*, registration of a share transfer) remains, the gift will be effective and pending the formality the donor will be a trustee (*Re Rose* [1952] Ch. 499 and cases cited there). Where the property concerned consists of an equitable interest, the situation is more fluid, because the legal and equitable ownership are already separated and also because equity rarely insists on formalities. Thus, a completely constituted trust or gift of an equitable interest may be made by (i) direct assignment to the donee (ii) declaration of trust and (iii) direction to the trustees or other legal owner to hold for the transferee (*Tierney* v. *Wood* (1854) 19 Beav 330; *Re Chrimes* [1917] 1 Ch. 30; *Re Wale* [1956] 3 All E.R. 280 noted *ante*, Vol. 20, p. 46; and *Timpson's Executors* v. *Yerbury* [1936] 1 K.B. 645, where a contract to assign was said to be a fourth method). In all such circumstances, the beneficial interest will pass to the transferee and consequently where the existence of a completely constituted trust is in question, judges have not unnaturally emphasised that a direction to trustees or other legal owner operates as an equitable assignment. (See the three cases last cited and also *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* [1905] A.C. 454—direction by a creditor to a debtor can amount to an equitable assignment.)

Grey v. *I. R. C.* On February 1 a settlor transferred a large number of shares to trustees as his nominees, the stamp being 10s. on a certificate that no beneficial interest passed. On February 18 the settlor orally directed the trustees to hold the shares on the trusts of six pre-existing settlements in favour of his grandchildren, with the intention of destroying entirely his own beneficial interest. On March 25 the trustees executed declarations reciting the verbal directions and acknowledging that the shares were held accordingly; the settlor executed these declarations but was not a party thereto.

Upjohn J., having found there were on the facts two separate transactions (thereby distinguishing *Cohen and Moore* v. *I. R. C.* [1933] 2 K.B. 126), pointed out that in the cases cited above the judges (including himself in *Re Wale, supra*) were not considering formalities. Consequently, he felt free to hold that a direction to trustees "operates as a transfer of the equitable interest to the donee by way of trust and not by way of assignment. . . . By giving directions to trustees as to new trusts it seems to me that the donor has deliberately chosen the path of declaring new trusts rather than the path of assignment" ([1958] 2 W.L.R. at p. 172; [1958] 1 All E.R. at pp. 250, 251). The learned judge had initially restricted his observations to "the voluntary transfer of an equitable interest in pure personalty where the legal estate is already outstanding in nominees." It may be observed, however, that in *McFadden* v. *Jenkyns* (1842) 1 Ph. 153, referred to in passing by Upjohn J., a creditor's verbal direction to a debtor to pay to a third party, acted on as to part by the debtor, was held, on a preliminary point of law, capable of constituting the debtor trustee for the third party. It would seem, therefore, that as a result of the present decision section 53 (1) (c) of the Law of Property Act

operates only on transactions directly between assignor and assignee of equitable interests, and has no application where the assignor addresses himself to the legal owner.

In the result, the declarations of March 25 did not have to be stamped *ad valorem*.

Oughtred v. *I. R. C.* Here a remainderman with an absolute interest orally agreed with the life tenant, on June 18, to exchange the settled shares for certain other shares of which the life tenant was absolute owner—a transaction admittedly equivalent to a sale. On June 26 the life tenant and the remainderman gave a release to the trustees and on the same day the trustees transferred the settled shares to the life tenant. Upjohn J. held that by the oral agreement the remainderman became a constructive trustee of his equitable reversionary interest for the life tenant, and that for this no writing was necessary, having regard to the Law of Property Act, 1925, s. 53 (1), cited above. The learned judge, referring to *Grey* v. *I. R. C.*, *supra*, said that "there are several modes of transferring equitable estates. One is by the transferor declaring himself a trustee for the transferee. The same result must surely follow where the transferor becomes a trustee by construction of law . . . on the making of an agreement for sale, the equitable title to the property agreed to be sold passes to the purchaser . . ." ([1958] 2 W.L.R. at pp. 179, 180; [1958] 1 All E.R. at p. 255). Once again, therefore, no *ad valorem* duty was payable.

The reasoning in *Oughtred's* case is, it will be seen, very refined. An agreement for sale of a legal interest makes the vendor constructive trustee for the purchaser simply because the legal estate does not pass, but the benefit and risk of the property do. Under an agreement to convey an equitable interest the whole interest seems to pass and there is no more to do—*per* Upjohn J. in the present case, and see also *Timpson's Executors* v. *Yerbury*, *supra*, *per* Romer L.J. [1956] 1 K.B. at pp. 664, 665.

Consequently, the constructive trust of the equitable interest is no sooner created than it is self-terminated because it transfers the trust property to the new *cestui que trust*. Moreover, it will now be necessary to distinguish between an actual assignment of an equitable interest and an agreement to assign. It is submitted, with respect, that the agreement should be regarded as passing the interest, as a dealing with the assignee, so that section 53 (1) (c) would apply.

If these decisions are upheld on appeal—one presumes there will be an appeal unless the Crown resorts directly to the coming Finance Act—the financial implications will, no doubt, be thoroughly explored. They raise also, however, the question of whether the rules in the Law of Property Act, 1925, s. 53, and indeed section 40 also, are in tune with the modern nature of property. As suggested in Lewin on *Trusts* (15th ed., p. 42), the framers of the Statute of Frauds may have intended to enact that trusts of personalty as well as realty should be created or evidenced in writing.

It is (one assumes) too late for the courts to achieve that end, but the whole subject might well be reviewed by the Law Reform Committee.

Re Moxon's Will Trusts [1958] 1 W.L.R. 165;
[1958] 1 All E.R. 386 (Ch.D.)

Trust—power of advancement—need for inquiry as to use by beneficiary—Trustee Act, 1925, *s.* 32 (1).—A trust fund worth some £55,000 was held on express protective trusts for A during his life and thereafter for A's children absolutely. A had only one child, B, now aged thirty-three. The trustees desired to advance £20,000 to B under the statutory power; this would not forfeit A's life interest and bring the discretionary trust into operation—*Re Rees* [1954] Ch. 202. The trustees did not know of any special purpose for which the advance was required but regarded B as a responsible person; moreover, estate duty would be saved if A lived five years. Danckwerts J. held that the word "benefit" was of the widest import, and justified a payment direct to the beneficiary, but the trustees could not be absolved from the duty of satisfying themselves that there was a proper case for advancement. In other words, they had to exercise their discretion.

It may be added that in recent years the courts have shown themselves ready to give a wide interpretation to such words as "benefit" or "application," whether occurring in instruments or statutes, but normally insistent that trustees shall find a case for the exercise of their powers—*Re Vestey's Settlement* [1957] Ch. 209; *Re Ropner's Settlement Trusts* [1956] 1 W.L.R. 902; [1956] 3 All E.R. 332, noted *ante*, Vol. 20, p. 405; *Re Powles* [1954] 1 W.L.R. 336; [1954] 1 All E.R. 577, noted *ante*, Vol. 18, p. 188; *Re Heyworth's Settlement* [1956] Ch. 364, noted *ante*, Vol. 20, p. 324.

Re McMorran, deccased [1958] 2 W.L.R. 327;
[1958] 1 All E.R. 186 (Ch.D.)

Power of appointment — special power — whether exercised by Scottish will—construction—conflict of laws.—X, the donee of a special power of appointment created by an English will, being resident and domiciled in Scotland, made his will in Scottish form giving "the whole means and estate, heritable and moveable, real or personal, wherever situated, which shall belong to me, or over which I may have the power of disposal at the time of my death" in trust for his wife for life and thereafter for his children. In English law these words would not have referred sufficiently to the special power to constitute an exercise of it—*Re Knight* [1957] Ch. 441, noted *ante*, Vol. 21, p. 305. Expert evidence showed that Scots law would treat the phrase as an exercise of the power. Harman J., after referring to some of the difficult cases that have arisen on general powers (see *Re Waite's Settlement Trusts* [1957] 2 W.L.R. 1024; [1957] 1 All E.R. 629, noted *ante*, Vol. 21, p. 233), said that the matter was really *res integra* and held the power validly exercised: ". . . the general principle must still apply that in matters of construction, as opposed to questions of validity and capacity, the English courts must find the true meaning of the

appointor from the words he has used in the frame in which he has used them" ([1957] 2 W.L.R. at p. 334; [1957] 1 All E.R. at p. 191). It is important to note that the words were spoken with reference to a foreign system of law which knows powers of appointment; intention to exercise a special power must be shown (*Re Knight, supra*; Dicey, *Conflict of Laws*, 6th ed., at pp. 831, 855) and this could hardly be shown by anything less than express words if the foreign law were unacquainted with powers (*cf. Re Price* [1900] 1 Ch. 442). The will, therefore, appointed the whole income to the wife; as the power only permitted half to be appointed the appointment was good as to half only, the remainder being struck out as excessive execution. This was an application of the principle that essential validity of special powers is governed by English law—*Pouey* v. *Hordern* [1900] 1 Ch. 492.

Re Allan's Will Trusts [1958] 1 W.L.R. 220; [1958] 1 All E.R. 401 (Ch.D.)

Rule against perpetuities—void discretionary trusts—subsequent limitation.—A testatrix, by her will, gave her residue (i) upon trust for her brother NN during his life and thereafter (ii) during the life of any wife he might marry on discretionary trusts for such widow, children, and any person "in whose house or apartments or in whose company or under whose care or control or by or with whom the widow [of NN] may from time to time be employed or residing" and (iii) on the determination of these trusts in trust for five named charities. Danckwerts J. held the discretionary trust during the life of the widow void both for uncertainty (following *Re Gresham's Settlement* [1956] 2 All E.R. 193, noted *ante*, Vol. 20, p. 326) and also for perpetuity (following *Re Coleman* [1936] Ch. 528). The ultimate trusts for the charities were, however, held to be vested interests independent of the prior void limitation and so good (*Re Coleman, supra*; Morris and Leach, *The Rule against Perpetuities*, pp. 165–174).

In the last sentence of his judgment, the learned judge said that the interests of the charities were not accelerated, so there was an intestacy of the income during the life of NN's widow. This decision presumably turned on the intention of the testatrix as derived from the will, but some elaboration of the point would have been welcome for the doctrine of acceleration is not a simple one—see Jarman on *Wills*, 8th ed., pp. 730 *et seq.*; *Re Flower* [1958] 1 W.L.R. 401.

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3. *CHARITIES*

By A. Kiralfy, Barrister-at-Law

Re Gillingham Bus Disaster Fund [1957] 3 W.L.R. 1069; [1958] 1 All E.R. 37

Non-charitable disaster fund contributions — resulting trust of surplus.—The Gillingham cadet disaster is fresh in many memories.

It led to criminal proceedings against the driver of the bus and civil claims for compensation. The Mayors of the Medway towns opened a fund for funeral expenses of the dead and aid for the disabled, after the accident in 1951. The bus undertaking paid damages, so that most of the fund, about £6,000 odd, was never needed. The question for Harman J. was the fate of this sum. Was it to be administered *cy-près* for similar charitable objects, returned to the donors, or paid to the Crown as *bona vacantia*? The case is the subject of an appeal but is so important that something should be said on the main problems raised.

(1) Was the fund a legal charity? No, said the learned judge, as it was for specific individual sufferers. In *Re Roadley* [1930] 1 Ch. 524 a gift to pay the expenses of unspecified patients in two named hospitals was held to be charitable, since the statute of Elizabeth I refers to the relief of the aged and impotent. In *Re Hillier* [1944] 1 All E.R. 480 a gift "to the sick and wounded" was held charitable, Vaisey J. stating that "The sick and wounded are undoubtedly a class of the community." In *Re Compton* [1945] Ch. 123 it was held that a charity must not benefit people because they are individuals but because they belong to a specified class (*per* Lord Greene M.R., at p. 129). The link must be impersonal. "If . . . it were necessary for them to establish the fact that they were the individuals AB, CD and EF . . . the gift ought not to be held to be a charitable gift (p. 130)." This clearly concludes the *Gillingham* case.

(2) The objects for which donations were invited included care of the cadets and other "worthy causes." Now some "worthy causes" might be legally charitable. It was therefore argued that, this being a pre-1954 trust, it was saved by the Charitable Trusts (Validation) Act of 1954, in that the fund could have been used for charitable purposes. This argument was rejected. It seems excluded by the decision in *Vernon* v. *I. R. C.* [1956] 1 W.L.R. 1169; [1956] 3 All E.R. 14, esp. 21. In *Vernon's* case the fund was designed for a sports ground for employees of a firm, which was not a charitable object. Outsiders could be admitted, but it was held that it was not intended that they should swamp the employees. Upjohn J. therefore held, *inter alia*, that the 1954 Act would not make the fund charitable. In the present case it was obvious that the relief of the known cadets was the primary object and that it was never contemplated that the fund should be exclusively devoted to other things; in fact £2,000 odd had been spent for the benefit of the cadets.

(3) Several cases cited to support the claims of the Crown, *e.g.*, *Braithwaite* v. *Att.-Gen.* [1909] 1 Ch. 510, were cases where funds were maintained under contracts, *e.g.*, annuity arrangements for contributors' widows, and a surplus existed after all the annuities had been provided. Those were not cases of trusts.

(4) Harman J. concluded that the surplus sum must be held on resulting trusts for donors and contributors. In the meantime, it must be paid into court, as in any other case where a trustee could not find a beneficiary. It seems practically impossible to identify small anonymous contributors to street collections and the like. In *Re Ulverston* [1956] 3 W.L.R. 559; [1956] 3 All E.R. 164, esp.

169 *et seq.*, the Court of Appeal dealt with an analogous case and there are dicta of Jenkins L.J. to the effect that you can treat untraceable gifts as given outright and return the larger identifiable contributions. This seems, with respect, illogical. The intent with which a gift is made should not depend on the accidental form it takes. Jenkins L.J. was impressed by the practice under which the Crown in fact applies *cy-près* sums which it receives as *bona vacantia*. Possibly some compromise will be reached which will permit return to bona fide claimants and therefore encourage generosity in future, and yet prevent the unclaimed balance from being sterilised.

(Theobald 347, 358.)

Re Whitworth Art Gallery Trusts [1958] 2 W.L.R. 181; [1958] 3 All E.R. 176

Inflation—charity impracticable—charter corporation—scheme.—A charter corporation operated a public art gallery. Its income proving insufficient to carry on, a scheme was approved by which the collection was administered by Manchester University on terms which permitted public viewing. Here the Governors of the Gallery approved the scheme. Vaisey J. held that the court can regulate such a charity. Had the Governors objected, it seems that the court would have had no power to interfere, in view of the privileges of royal charters (*Att.-Gen.* v. *Governors of Christ's Hospital* [1896] 1 Ch. 879).

(Theobald 358.)

Re Tacon [1958] 2 W.L.R. 66 (C.A.); [1958] 3 All E.R. 163

Impracticability judged at outset but on future prospects.—If a charitable object is practicable at the outset the funds will later be applied *cy-près*; if it is impracticable from the outset the funds will be treated as undisposed of (*Re White* [1955] Ch. 188). With the effects of inflation the date of decision is very important. In the instant case the testator bequeathed a fund to charitable objects after a life interest. The value of the fund would have been sufficient to achieve the objects had there been no life interest, but this was irrelevant. The present cash value of the reversion was equally clearly inadequate at the date of the death of the testator. It was held that one must look with the spectacles of 1922, when the testator died, not 1952 when the life tenant died, and try to judge prospectively whether the objects were impracticable, whether there was then any reasonable prospect of it becoming practicable. By 1952 the fund had become inadequate, but could such inflation fairly be foreseen? Inquiries were, therefore, ordered to continue. A court is certainly required to perform odd mental gymnastics in such cases.

(Theobald 358.)

4. *WILLS*

By A. Kiralfy, Barrister-at-Law

In the Estate of Last [1958] 2 W.L.R. 186; [1958] 1 All E.R. 316

Probate court — limited power to construe will — special circumstances.—The Chancery Division is the proper forum for the construction of wills, but the Probate judge may be compelled to make some preliminary construction in order to decide on the priority of applicants for administration with the will annexed, *e.g.*, whether some person is or is not the residuary legatee. After the grant is made, there may be further proceedings in the court of construction, the result of which might be a different interpretation and a revocation and fresh grant of representation. In the instant case, B left her estate in the first instance to T, but on his death it was to go to C and H. T proved B's will and died intestate. The question was whether T took absolutely so that, having no near relatives, the Crown could claim on T's intestacy, or whether C and H took the estate on a gift over after a life estate to T. As the estate was small, and might be exhausted by two successive proceedings, Karminski J. gave his opinion as to the construction of the will. In his view, T took a life interest with a power of disposition *inter vivos* (rather like a power to appoint by deed) but C and H took the remainder subject to that power (following *Constable* v. *Bull* (1849) 3 De G. & S. 411). He emphasised that the Probate judge would not normally act as court of construction (following *In the Estate of Fawcett* [1941] P. 85).

(Theobald 87, 434.)

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5. *LANDLORD AND TENANT CASES*

By D. Macintyre, m.a., Barrister-at-Law

Weinbergs Weatherproofs, Ltd. v. *Radcliffe Paper Mill Co., Ltd.*
[1958] 2 W.L.R. 1; [1957] 3 All E.R. 663

Landlord and Tenant Act, 1954 — *business premises — notice to determine tenancy in accordance with break clause—effect of notice.*— Harman J. held in this case that a notice to quit served by a landlord in accordance with the terms of a lease of premises, to which Part II of the Landlord and Tenant Act, 1954, applies, is effective to cut down the term demised by the lease. It does not, of course, put an end to the tenancy, which continues by virtue of section 24 (1) of the Act. But from the date of the expiration of the notice the tenant holds over by virtue of the Act alone: and the tenancy can be terminated at any time thereafter either by the landlord under section 25 of the Act or by the tenant under sections 26 or 27.

In October, 1950, the plaintiffs took a lease of certain premises for a term of twenty years from September 29, 1950, terminable by either party at the end of the seventh or fourteenth year by giving six months' notice in writing: and in 1953 they took a supplemental lease of further rooms in the same building for a term of eighteen years from September 29, 1952, the break clause to be deemed to be incorporated therein, as if it had been therein repeated. In January, 1957, the original landlords sold the whole of the premises to the defendants, who immediately served on the plaintiffs a written notice "to determine the said leases and to put an end to the terms thereby respectively created" on September 29, 1957. The plaintiffs claimed that by reason of section 24 of the Act of 1954 the defendants' notice (not being in the form prescribed by section 25) was completely ineffective, so that the terms granted by the leases were still continuing and could not be brought to an end before the end of the fourteenth year. The defendants contended that the notice was effective to cut down the terms to seven and five years respectively, and that the plaintiffs were holding over by virtue of the statute alone. Harman J. found for the defendants. It was not necessary, in his view, in order to give the Act its intended effect, to deprive the landlords of their right to shorten the term granted in accordance with the break clause, since the tenants still had the right of occupation which they would have had if the terms had originally been of seven and five years and the right to claim a new tenancy under the Act, whether the landlord served a statutory notice under section 25 or not. Indeed, if that were not so, he found it difficult to see how a landlord could ever avail himself of his right under a "break clause" in a lease. A notice in the statutory form would be ineffective because it would not comply with the break clause; and a notice which complied with the "break clause" would be ineffective because it would not be in the statutory form.

Grace Rymer Investments, Ltd. v. *Waite*
[1958] 2 W.L.R. 200; [1958] 1 All E.R. 138

Rent Acts—premium—rent paid in advance—subsequent mortgage of landlord's interest — validity of tenancy against mortgagee.— According to the decision of Danckwerts J. in this case, the fact that a tenancy of premises is granted in return for a premium which is illegal by virtue of section 2 of the Landlord and Tenant (Rent Control) Act, 1949, does not render the tenancy invalid. A mortgagee of the landlord's interest, therefore, who takes his mortgage after the tenancy has already been created, is not entitled to possession against the tenant upon the mortgagor's default.

In November, 1955, the landlords contracted to purchase certain premises in London which were conveyed to them by a transfer dated December 30, 1955. On the same day (December 30, 1955) the landlords executed a legal charge of the premises in favour of the plaintiffs to secure an advance of £1,700: and both the transfer

and the legal charge were registered under the Land Registration Act, 1925, on January 9, 1956. Prior to December 30, 1955, however, the landlords had already granted tenancies of three rent-controlled flats in the premises in return for lump sums representing approximately three years' rent in advance in each case. All three lettings were oral, but they had all been completed by entry before the date of the transfer and the legal charge. The titles of the tenants were, therefore, completed against the landlords as soon as the landlords received the legal estate in the premises: and the tenancies were "overriding interests" against the mortgagees under section 20 (1) of the Land Registration Act, 1925, provided only that the tenancies were lawful (see *Church of England Building Society* v. *Piskor* [1954] Ch. 553). It was argued, however, in an action for possession brought by the mortgagees (an earlier judgment against the landlords for principal and interest not having been satisfied), that (1) the advance payments made by the tenants in each case were premiums, and (2) since they were illegal premiums, the tenancies were unlawful tenancies. Danckwerts J. agreed that upon the facts of this case the payments were premiums: but he held that this did not render the tenancies invalid. He therefore dismissed the claim for possession against the tenants.

Upon the first point he thought that it cannot be a premium or unlawful to require a payment of rent in advance in every case. Each case depends upon its own facts. "I apprehend," he said ([1958] 2 W.L.R. at p. 210), "that one test may be that if the demand is obviously a device to get over some provision of the law, and not merely a bona fide attempt to prevent the landlord being deprived of the ability to recover his rent, the transaction may be scrutinised and be shown to be something other than what it is called." He also referred, with approval, to some observations of Romer L.J. in *Woods* v. *Wise* [1955] 2 Q.B. 29, 55, to the effect that a requirement of the payment of substantially the whole of the rent in advance as a condition of granting a fourteen or twenty-one year lease of rent-controlled premises would be an illegal premium. Upon the facts of this case the landlords had required the payment of premiums.

But the Rent Acts were passed to protect tenants and to restrain the demands of landlords. It is the act of the landlord in requiring an illegal premium which is an offence under section 2 of the Act of 1949; and a tenant is not treated by the Acts as tainted by offences committed by his landlord. Indeed, he is protected against them (see Act of 1949, s. 2 (5); Act of 1920, s. 14 (1) and amendment thereto in Act of 1939, Sch. I).

Warner v. *Sampson and another* [1958] 2 W.L.R. 212; [1958] 1 All E.R. 44, 314

Forfeiture — repudiation of landlord's title — action by landlord against two executors—statement of claim setting out landlord's title

—general denial of statement of claim by one executor—no defence by other executor—reply by landlord forfeiting lease—relief against forfeiture.—This was an action by a landlord against two executors for forfeiture of a lease of a dwelling-house for ninety-nine years from 1900 on the ground of non-payment of rent and breach of repairing covenants. The first defendant was also entitled to the use of the house during his life. The writ was issued in April, 1955, and the statement of claim referred (*inter alia*) to the lease and to the plaintiff's title as successor of the original landlord. In May, 1955, judgment was entered against the first defendant in default of appearance: but on June 15, 1955, the second defendant delivered a defence, which, after an admission of her executorship and a denial that she had broken any covenant, proceeded as follows—"Save and except for the admission" (in the singular) "herein contained, this defendant denies each and every allegation in the statement of claim as if the same were specifically set out and traversed *seriatim*." This defence was designed solely to stay the hand of the landlord while attempts were made to persuade the first defendant to remedy the breaches: but on June 29, 1955, the landlord delivered a reply alleging that the second defendant had, by her defence, disclaimed and disputed the landlord's title and exercising her right of forfeiture on that account. Subsequently, the judgment against the first defendant was set aside and the second defendant was given leave to amend, but not to withdraw, her defence. A defence of the first defendant and an amended defence of the second defendant were then delivered, both of which admitted the lease and the landlord's title and contained (for the first time) a counterclaim for relief against forfeiture. The landlord claimed, however, that the lease had already been forfeited in June, 1955.

Ashworth J. gave judgment for the landlord. Upon the true construction of the original defence of the second defendant, he held, the title of the landlord had been clearly and unambiguously denied. The landlord's reply, exercising her right of forfeiture, would therefore have been conclusive against the second defendant, had she been the sole lessee. But the question then arose whether that defence of the second defendant was binding on her co-executor. Upon this point the learned judge held (following *Simpson* v. *Gutteridge* (1816) 1 Madd. 609) that a denial of a landlord's title in the defence of one executor binds another executor, unless that other executor puts in a defence admitting the landlord's title. The principle applied in *Leek and Moorlands Building Society* v. *Clark* [1952] 2 Q.B. 788, that "in the absence of express words in the lease, or of authority, one of two joint lessees cannot surrender rights held jointly before the full period of the lease has run," does not apply to joint tenants who are executors of a deceased tenant. Nor is a repudiation of a landlord's title a disclaimer of the lease and therefore a "conveyance" within the meaning of sections 2 (2) and 55 of the Administration of Estates Act, 1925, so as to make the consent of all the executors necessary under that Act. The lease had, therefore, been effectively forfeited upon the delivery of the landlord's original reply, and the learned judge gave judgment accordingly.

The case came before the court again, however, upon an application by the tenants under section 146 of the Law of Property Act, 1925, for relief against forfeiture. Upon this point (which is separately reported in the *All England Reports* at p. 314) Ashworth J., having decided in the particular circumstances of the case to hear argument on the point at this stage, held that section 146 was not applicable. This was a forfeiture by operation of law, not a forfeiture under a proviso or stipulation in a lease for a breach of covenant or condition contained in the lease, to which alone the section applies.

Harewood Hotels, Ltd. v. *Harris* [1958] 1 W.L.R. 108; [1958] 1 All E.R. 104 (C.A.)

Landlord and Tenant Act, 1954—*business premises—terms of new tenancy—rent—admissibility of evidence of previous profits—costs of application.*—The tenants applied for a new tenancy of an hotel which they held of the landlord. The landlord offered seven years at £750 per annum. The tenants offered £450 per annum for fourteen years. The county court judge awarded seven years at £450 per annum for the first three years, then £500 per annum, and ordered the landlord to pay half the tenants' costs. In reaching his conclusion about the rent the judge admitted in evidence a trading account which showed the results of carrying on business on the premises for the previous five years. The main question which arose was whether this evidence was admissible in view of section 34 (1) of the Landlord and Tenant Act, 1954, which provides that in calculating the rent at which the holding might reasonably be expected to be let in the open market by a willing lessor there shall be disregarded (*inter alia*) (a) any effect on the rent of the fact that the tenant or his predecessors in title have been in occupation of the holding, and (b) any goodwill attached to the holding by reason of the carrying on thereat of the business of the tenant.

The Court of Appeal held that the evidence was admissible as an indication of the earning capacity of the hotel to a potential lessee: but that it was not admissible for any other purpose. It was agreed that the fact that the sitting tenant has been in occupation for a long time and has built up a goodwill is to be disregarded in assessing the rent which is to be payable under a new lease: and that the court cannot take into account any particular hardship suffered by the tenant. But, in the judgment of Lord Evershed M.R., "it is plainly legitimate for a judge to hear evidence which bears upon the question which he has to decide, namely: what would the particular holding reasonably be expected to be let at in the open market?" For the purpose of indicating the answer to that question, and that question only, the trading accounts were admissible.

Upon the question of costs it was held that the judge had not exercised his discretion otherwise than judicially. The tenants' offer was nearer the right result than that of the landlord: but the order also reflected the fact that the landlord had succeeded on the question of the length of the term. No wrong analogy had been applied, as in *Le Witt* v. *Brookes* [1956] 1 W.L.R. 1438; [1956] 3 All E.R. 676 (noted at Vol. 21, p. 78).

6. *REVENUE CASES*

By David R. Stanford, m.a., ll.b., Barrister-at-Law

(*Note*:—Where a case is not reported in any of the general series of law reports it is cited from *Annotated Tax Cases* (A.T.C.) and *Taxation Reports* (T.R.).)

Ramsden v. *C. I. R.* [1957] T.R. 247 (Ch.D.)

Income Tax—Transfer to non-resident—Capital payment to resident

Statutory provision: Income Tax Act, 1952, s. 412.

Point: Liability to income tax arises under subsection (1) of the Income Tax Act, 1952, s. 412, when a transfer of assets has been made whereby income becomes payable to a person resident or domiciled out of the United Kingdom and a person ordinarily resident in the United Kingdom, by means of such transfer, acquires rights whereby he has power to enjoy the income of a non-resident. By subsection (5), power to enjoy the income of a non-resident is given an extended meaning and in particular by paragraph (b) if "the receipt or accrual of the income operates to increase the value to the individual of any assets held by him or for his benefit." Further, by subsection (2), if an individual, ordinarily resident, receives or is entitled to receive any capital sum, the payment whereof is connected with the transfer, any income which by virtue of or in consequence of the transfer has become income of the non-resident may be charged to tax as income of the resident. Capital sum, in this connection, includes a sum paid or payable by way of repayment of a loan.

Where an individual transfers assets to a non-resident company and the purchase price is left outstanding the debt owed by the company to the vendor is not a loan by the vendor and hence he is not thereby entitled to receive repayment of a loan. However, when income flows into the company it increases the value of an asset of the vendor, namely, the debt owed to him, and hence he has "power to enjoy that income" within the extended meaning of that phrase set out above. Hence, tax arises under subsection (1) on the income of the non-resident company.

Facts and decision: Mr. Ramsden transferred shares to a Kenya company called Marula Trust, Ltd. Thenceforth, the balance sheet of the company showed a balance due to Mr. Ramsden under two heads, first, a sum subscribed in anticipation of share allotment and, secondly, the balance of consideration under the vending agreement. It does not appear from the report how the first of these two items arose, but presumably this was some form of transfer other than the transfer of the shares to the company as above. The Commissioners claimed tax in respect of the income of the company for a

particular year when the company received a large dividend basing their claim first under subsection (2) and secondly under subsection (1) of the Income Tax Act, 1952, s. 412. So far as the claim under subsection (2) was concerned, the Crown alleged that the outstanding sums on both accounts were loans repayable by the company.

Held: By Harman J., that the sum subscribed in anticipation of a share allotment might well be described as a loan but it had nothing to do with the transfer in question and hence could not give rise to liability to tax. The balance of consideration under the vending agreement was held not to be a loan and hence did not bring subsection (2) into operation. Nevertheless, the value of the debt owed by the company to the vendor was clearly increased by the increase of assets of the company and hence tax was exigible under subsection (1).

It would not appear to have been alleged by the Crown that the payment to the company of the sum subscribed in anticipation of share allotment itself operated as a transfer of assets to the company. If such a payment was in fact made then the amount shown as due to the taxpayer would clearly have been connected with the transfer. May it be, perhaps (if such a payment was made), that the Revenue accept that the payment of cash is not a transfer of assets for the purposes of the Income Tax Act, 1952, s. 412?

Jennings v. *Kinder*; *Hochstrasser* v. *Mayes*
[1958] 1 All E.R. 369 (Ch.D.)

Income Tax—Benefit to employee—Voluntary payment—Expense

Statutory provision: Income Tax Act, 1952, ss. 156, 160 and Sch. I, Rule 1.

Point: Payments made by an employer to an employee are not necessarily taxable sums in the hands of the employee. It is well established that a personal gift, that is, a gift to an employee on grounds personal to him and not to him *qua* employee, is not a taxable sum in the hands of the employee. That being the only kind of bounty received by an employee from his employer which has been judicially held not to be a taxable receipt, it is sometimes considered that such is the only example of a payment between employer and employee to the latter's benefit which is non-taxable. However, to be a profit arising from the employment, the payment must be made in reference to the service the employee renders by virtue of his office and it must be something in the nature of a reward for services past, present and future. Thus, there is no sharp division between personal presents and taxable payments. It is a question for evidence in each case as to whether the sum was received as remuneration for the services rendered in the office.

Facts and decision: In both the present cases, the taxpayers were employed by a company which ran a housing scheme for the assistance of employees. Under this scheme the employees were given interest-free loans secured on mortgage of their houses. Further the employer undertook, *inter alia*, that, should the employee be transferred elsewhere and the house sold, the employer would bear the loss incurred on the re-sale. Entry into the housing scheme was not a condition or term of service. Participation in the scheme was voluntary both by the employer and the employee although, of course, no non-employee could participate in the scheme. The Crown sought to tax the sum paid in reimbursement of a loss suffered by each employee, their houses being sold when the company transferred the employees from one place of business to another. It was alleged by the Crown that the payments were perquisites or profits arising from the employment as they were not sums paid for full value, nor were they personal gifts. In the case of Mr. Jennings he was, at the relevant time, receiving emoluments in excess of £2,000 a year and an alternative claim to tax the payment in his case was made under the Income Tax Act, 1952, s. 160 (1), as a payment in respect of expenses.

Held: By Upjohn J., that in neither case was the sum paid by the employers a taxable receipt of the employee. Whilst agreeing that the benefit of the housing agreement was an advantage to the employee, the receipt of benefit thereunder was not a profit arising from the office. "One must find, looking at the true nature of the transaction, whether it was a profit arising from his office. In my judgment, as I have said, it was not. It was in no true sense a reward for his services. It was an advantage to him but not in my judgment a profit. It was something which was wholly collateral and really had nothing to do with the office or the services which he was bound to render to his employers."

With regard to the claim under section 160 (1) the Crown's claim failed as there had been no payment in respect of expenses. The employee had been put to no expense. He had merely suffered a loss on the sale of his house. The only expense the employee incurred was the original purchase of the house: he had suffered a loss, but he had not incurred an expense.

Wigram Family Settled Estates, Ltd. (In Liquidation) v. *C. I. R.* [1958] 1 W.L.R. 213; [1958] 1 All E.R. 338 (H.L.)

Surtax—Investment company—Apportionment

Statutory provisions: Finance Act, 1922, s. 21, and Sch. I, para. 8 (now Income Tax Act, 1952, ss. 245 and 248).

Point: The House of Lords has now confirmed the decision of the Court of Appeal (noted *ante*, Vol. 21, p. 171) which itself

upheld the decision of Vaisey J. On apportionment, pursuant to a surtax direction, the Commissioners apportioned income to preference shareholders, some of whose shares were redeemable, having regard only to their preference dividend rights and apportioned the remainder of the income to the ordinary shareholders. The company was bound by its articles to set aside certain amounts of income in each year which would otherwise have been available for distribution to the credit of a redeemable preference share redemption fund. Such setting aside had in fact taken place and the company contended that more income should have been apportioned to the preference shareholders by reason of the interest that they had in income placed in the redemption fund. At no time was there any doubt as to the capital of the redeemable preference shares being well secured apart from the redemption fund.

In upholding the decision of the Commissioners and of the two lower courts, the House of Lords held that the interest of the preference shareholders in the sums transferred to the redemption fund was negligible in comparison with the interest of the other shareholders, for so far as the former were concerned the transfer to the redemption fund merely increased the already adequate security for the repayment of their shares and in no way increased the amount of money which they would be entitled to receive.

The argument that it would be a hardship on ordinary shareholders that an apportionment should be made to them in any year of income on which they could not lay their hands was rejected as not relevant. Viscount Simonds stressed (at [1958] 1 All E.R. p. 341) that "the question is not whether such an apportionment would be a hardship on them but what are the respective interests of the different classes of shareholders in the actual income of the appellant company."

Oughtred v. *C. I. R.* [1958] 2 W.L.R. 174; [1958] 1 All E.R. 252 (Ch.D.)

Stamp duty—Purchase of reversion—Conveyance to absolute owner

Statutory provisions: Stamp Act, 1891, ss. 54, 55, and Sch. 1; Law of Property Act, 1925, s. 53 (1) and (2).

Point: On making an oral agreement for the sale or exchange of a reversionary interest in pure personalty the vendor becomes a constructive trustee of his equitable reversionary interest in the trust funds for the purchaser. Such trust arises by operation of law and hence writing is not essential to satisfy the Law of Property Act, 1925, s. 53. If this sale is to the life tenant, so that he becomes the absolute owner in equity of the trust fund, the subsequent transfer of the trust fund to him passes nothing, except the

bare legal estate. The equitable interest in reversion passed on the agreement for sale and not upon the subsequent transfer. Further, a subsequent transfer is not a conveyance on sale within the meaning of section 54 of the Stamp Act, 1891, where the absolute owner in equity cannot call upon the trustees to convey the trust property to him merely on proof of the agreement for sale. The trustees are entitled before parting with the trust assets to obtain the assent of every beneficiary under the trust and to have a release from their duties and obligations. Although, therefore, the transfer by the trustees to the now absolute owner is executed as a direct result of the agreement for sale, it is not a conveyance on sale but a conveyance on the winding up of the trust. No *ad valorem* duty is therefore payable on the conveyance by the trustees to the person absolutely entitled, but merely a fixed duty of 10s.

Facts and decision: A trust fund consisting of shares was held upon trust for A for life and then to B absolutely. B agreed orally to exchange his reversionary interest under the settlement for certain shares owned by A. A deed of release of the trustees was executed by A, B and the trustees and on the same day the trustees transferred the settled shares to A, A transferring her shares to certain persons at the direction of B. The Commissioners claimed *ad valorem* stamp duty on the transfer from the trustees to A.

Held: The only duty payable was 10s., the conveyance not being a conveyance on sale nor a conveyance of the equitable interest. The *ad valorem* duty already paid was ordered to be repaid, but without interest.

It is to be noted that this case is no authority for the proposition that shares transferred by a nominee to a purchaser after an oral agreement for sale escape *ad valorem* stamp duty. In fact, Upjohn J. stated "For example, where shares are in the names of nominees, the transfer from such nominees is plainly a conveyance on sale. . . ."

[See further note, p. 141, *ante*.]

Grey and Another v. *C. I. R.* [1958] 2 W.L.R. 168; [1958] 1 All E.R. 246

Stamp Duty—Oral Direction to Trustees—Deed of Declaration

Statutory provisions: Stamp Act, 1891, Sch. I; Finance (1909–1910) Act, 1910, s. 74 (1); Law of Property Act, 1925, s. 53 (1) (c).

Point: Oral declarations of trust do not bear stamp duty for there is no document which is stampable. An oral direction to the trustees holding the legal interest in shares to hold them upon certain trusts likewise can give rise to no stamp duty. If the

trustees subsequently declare for the purposes of evidence by deed the trust upon which they hold the shares, such document can only be stampable if either that document alone transferred the equitable interest from the settlor, or that document and the oral declaration of trust together caused the transfer of the equitable interest being, in effect, one transaction. Whether or not it is one transaction is a question of fact. It now appears that the oral declaration of trust is sufficient of itself to transfer the equitable interest, for it is not a "disposition of an equitable interest or trust subsisting at the time of the disposition" within the Law of Property Act, 1925, s. 53 (1) (c) and hence writing is not essential to its validity.

Facts and decision: The settlor, on February 1, transferred shares to trustees as bare nominees. On February 18 he gave oral directions to the trustees to hold the shares on the trusts of a settlement created by him some six years previously. On March 25 the trustees executed a deed of declaration of trust. That deed recited the settlor's direction and declared that the trustees were holding the shares on the trusts of the settlement in addition to the funds that were previously subject thereto. The settlor was not a party to the deed but executed the deed in order to witness that it correctly set forth his declaration. The Crown claimed that the deed of declaration was a conveyance or transfer of the equitable interest in the shares operating as a voluntary disposition *inter vivos* and hence liable to *ad valorem* stamp duty under the Finance (1900–1910) Act, 1910, s. 74. It was alleged that nothing passed by virtue of the oral declarations for such was a purported equitable assignment and needed to be put in writing by virtue of the Law of Property Act, 1925, s. 53 (1) (c). Alternatively, it was submitted that the oral declaration and the deed must be stamped as the two transactions together were, in effect, all one transaction, the deed being the final operative document.

Held: By Upjohn J., that the deed should bear only a 10s. stamp. Without deciding whether the Commissioners could properly have drawn the inference from the evidence before them that the oral directions and subsequent written declarations were all part of one transaction, he noted that they had not done so and, even if he had power to draw that inference where the Commissioners had not done so, he was not prepared to take that course.

It should be noted that two pitfalls await those who attempt to copy this form of stamp duty avoidance. First, the Crown may succeed in showing that the oral declaration and declaration of trust are all one transaction and hence stampable by virtue of *Cohen and Moore* v. *C. I. R.* [1933] 2 K.B. 126. This may be avoided by not having the declaration of trust, for such is purely evidence if this present judgment stands. Should, however, the present judgment be reversed on appeal so far as it concerns the construction of section 53 (1) (c) of the Law of Property Act, 1925, the absence of a further document would prevent the property having been validly transferred from the donor to the donee with serious consequences, both for tax and estate duty.

[See further note, p. 141, *ante*.]

7. *MISCELLANEOUS*

Hamzeh Malas & Sons v. *British Imex Industries, Ltd.*
[1958] 2 W.L.R. 100; [1958] 1 All E.R. 262 (C.A.)
British Imex Industries, Ltd. v. *Midland Bank, Ltd.*
[1958] 2 W.L.R. 103; [1958] 1 All E.R. 264

Letters of credit—right to stop—presentation of clean bill of lading.—An English vendor sold certain goods to a Jordanian firm, delivery to be by two instalments and payment to be made under confirmed letters of credit with an English bank. The first instalment was shipped and the bank paid for it on presentation of the shipping documents. The buyers rejected the goods as not being in accordance with the contract and in the first of these actions sought an injunction to prevent the sellers drawing on the second letter of credit. It is hardly surprising that the Court of Appeal refused the injunction. The court held that "the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes upon the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties as to whether the goods are up to contract or not."

The second action was by the sellers against the bank. It is well settled that the bank pays against the documents specified in the terms of the letter of credit. Among the documents specified in this case were bills of lading and the court held that, in the absence of special circumstances, this means clean bills of lading. The question was whether the particular bills of lading were clean. Salmon J. said: "I incline to the view, however, that a clean bill of lading is one that does not contain any reservation as to the apparent good order or condition of the goods or the packing. In my judgment, the bills of lading in this case are plainly clean bills of lading. They contain no reservation by way of endorsement, clausing or otherwise, to suggest that the goods or packing are or may be defective in any respect."

Coutts & Co. v. *Duntroon Investment Corporation, Ltd.*
[1958] 1 W.L.R. 116; [1958] 1 All E.R. 51

Rent and mortgage restrictions—interest in arrear for more than twenty-one days—arrears paid before proceedings—statutory protection lost.—It is provided by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 7, that, subject to certain exceptions, a mortgagee of rent restricted property may not enforce his security so long as certain conditions are complied with. One of these is that interest is not more than twenty-one days in arrear. In the instant case a payment of interest fell due on July 9, 1957. It was paid on July 31, a day late, and acknowledged as payment on account by the mortgagees, who forthwith called in the principal sum on the ground of the twenty-one days' default and on September 13 they issued a summons claiming the principal.

In *Evans* v. *Horner* [1925] Ch. 177 Russell J., in a rather similar case, held that the section only suspends the rights of the mortgagee during one continuous period, which lasts so long as the conditions of the section are complied with. When once those conditions are broken a subsequent compliance with them does not revive the protection given by the section. That decision was approved by the Court of Appeal in *Nichols* v. *Walters* [1954] 1 W.L.R. 1. In the instant case Harman J., although rather sympathising with the contrary view laid down in the Irish case of *Wallace* v. *Fogarty* [1926] 1 I.R. 255, felt he must follow the principle laid down by Russell J. and declined to make any narrow distinction.

It is hardly surprising that mortgagees of rent restricted property often seek repayment, for the rates of interest are often wholly unattractive. Perhaps we shall find mortgagees looking round to see whether any of the other statutory conditions, *e.g.*, as to repair, have been broken or whether at any time there has been a change in tenancy, for it would seem that, even apart from the Rent Act, 1957, once a landlord becomes entitled to possession protection is lost and does not revive on a fresh letting.

THE LIBRARY

An Englishman Looks at the Torrens System. By Theodore B. F. Ruoff, Solicitor. Australia: The Law Book Co. of Australasia Pty., Ltd. ix and 106 pp. London: Sweet & Maxwell, Ltd. (£1 5s. net.)

Babbitt, it will be remembered, was in favour of introducing the Torrens system into his American state to show it was go-ahead, and today the advocate of registration of title has an easy task, for no conveyancer with any considerable experience of the two systems of registered and unregistered conveyancing would dream of opting for the latter. The author of this little book of essays is probably right when he says that few English solicitors have ever heard of Sir Robert Torrens. The essays are published to mark the centenary of the first Act to introduce the Torrens system, but let us hasten to add that they are mainly concerned with the operation of, and particularly the defects in, the system as worked today in various parts of the Commonwealth, and there is a good deal that is relevant to English practice.

The author needs no introduction to readers of the *Conveyancer*. He is a registrar at H.M. Land Registry, but he has never been satisfied with a mechanical approach to registration of title. Let those who criticise the Registry ponder his words: "I wonder whether it has ever occurred to the reader that in matters of land transfer the customer is always right? That is to say, if a landowner wishes to carry out, for business (or even personal) reasons, a novel transaction in an unwonted manner, no obstacles should be put in his way merely because the thing has not been done before. . . . I believe the customer's requirements should receive consideration first, last and all the time. . . . Ideally, a titles office is an insurance organisation in which the State insures at their *full* value all title to land on a business-like basis (showing neither loss nor excessive profit) for the benefit of the householder, the farmer, the oil company or any other owner of any interest in land."

Mr. Ruoff has a number of suggestions that merit careful consideration here. Many practitioners bemoan the excessive length of leases which irritates the clients and takes away much of the solicitors' profits. The suggestion of standard forms for incorporation has sometimes been regarded as impracticable and has certainly not received much support here, but we were pleasantly surprised to find it has been put into effect by statute in certain Australian states.

As the essays have appeared in various journals, including the *Conveyancer*, there is a certain amount of repetition, but this is only a slight blemish. For the practitioner who is not content to be a mere mechanic in relation to registration of title, this is a stimulating book. It is unnecessary for us to add that the author writes not merely learnedly but in a lucid and happily pleasing style. The book is a worthy tribute to Sir Robert Torrens.

E. F. G.

Aspects of Justice. By Sir Carleton Kemp Allen, Q.C. Stevens & Sons, Ltd. 310 pp. (£1 5s.)

The Advocate's Devil. By C. P. Harvey, Q.C. Stevens & Sons, Ltd. 166 pp. (12s. 6d.)

Sir Carleton Allen's book of essays consists of five essays on different aspects of justice, three on cruelty, one on the conscience of counsel and one

on the literature of the law. The author, in his attitude towards jurisprudence, has always kept his feet on the ground and he regards the study of law as being necessarily bound up with the actual application of law in the day-to-day business of the courts. If he does not, in these essays, present any startling new thought, he sets out various philosophical conceptions of justice clearly and examines their relations to modern conditions and judicial practice. He makes a very good point when he contends that a just law may work injustice if it is not justly applied and that an unjust law may be applied justly. A consideration of the attitude of South Africans and the southern states in America towards negroes shows the soundness of this view. Is it better for the law to give negroes equal rights, but practice to deny them, or for the law not to give equal rights but practice to ensure them such rights as are given them? Substantive law must not be too far in advance of public opinion or the law will not be justly applied.

The essay on matrimonial cruelty makes dismal reading. If, in fact, the divorce courts had to adopt the line of approach laid down by the superior courts and try to consider the workings of the minds of the parties, considerable injustice might result, but in practice the courts tend to apply the "plain and sober and simple notions among the English people," to take a phrase from an entirely different context. The author, as might be expected, is in favour of the more practical approach.

Mr. Harvey's essays, partly reflections, partly reminiscences, make very pleasant reading, but the lightness of the touch should not deflect the eye from the more serious matters, particularly relating to legal practice, which he considers. Both Sir Carleton Allen and Mr. Harvey are obviously disturbed by the theory that counsel should not hesitate to defend a person he knows to be guilty. Oddly enough, little thought appears to be given to the attitude to be adopted in civil cases. The majority of solicitors would not consider it morally proper to use the defects of civil litigation machinery to evade liability by putting up a defence known to be untrue. Apparently, in criminal cases it is in order to be blind to the obvious and therefore proper for a solicitor to know the truth but not pass it on, but can one really evade the issue in this way? The difficulties involved are well brought out by the Australian *Dean* case examined in detail by Sir Carleton Allen.

Although Mr. Harvey does not accept all the old shibboleths, *e.g.*, that English common law is the perfection of wisdom, it is clear that many of the loyalties remain. Rather like Juvenal, he has a good deal of criticism for those no longer with us, but the Bench and Bar of today are practically beyond reproach. Fusion is simply dealt with by disposing of an imaginary argument in favour of it. But are the organisation and rules of the Bar ideal? Is it just that the unfortunate lessee in *Warner* v. *Sampson* [1958] 2 W.L.R. 212 should lose his lease because counsel denied his landlord's title, and have no remedy? If the pleader had been a solicitor in a county court the lessee would have paid less but been protected. Is it really true that counsel must accept a brief unless there is good ground for rejecting it? The Bar Council did not seem to take this view when war crimes were being tried. Are the rules against touting consistent with the method of remunerating counsels' clerks? Most professions would not think so.

The two books under review are yet further examples of the high literary standard so often shown by English lawyers.

J. H. G.

The Law of Married Women. By M. Turner-Samuels, Q.C., M.P. Thames Bank Publishing Co., Ltd. 480 pp. (£4 4s. net.)

This book gives an account of the rules of law, other than divorce law, which particularly concern married women. It thus covers such diverse topics

as gifts between spouses, separation deeds, income tax, and family provision. The busy solicitor may sometimes find it very difficult to put his finger on the exact rule, where a question arises as to the property of spouses, and this book, while not pretending to discover any rules of law hitherto unknown, deals quite clearly and simply with such questions, and may be recommended for use by the practitioner. The preface also expresses the hope that the book may be of value to the student, but in fact this seems improbable, unless perhaps a student may care to use it for reference only. It is essentially a practitioner's book. So far as the reviewer is aware there is no other book which covers the same ground as this, and so it is not possible to describe the nature of this book by making comparisons. But altogether it seems accurate and objective, and should prove of practical value.

The printing of the book seems to have taken a long time. The preface is dated in the year 1954, and the law appears to be stated as in that year; indeed, in many instances it only manages to be as recent as that by resort to "additional notes" put in at the end of the book. The criticism must therefore be made that the book is already, to some extent, out of date.

D. C. P.

Elements of Income Tax. Third ed. By C. N. Beattie, ll.b., Barrister-at-Law. London: Stevens & Sons, Ltd. xxviii and 214 and (index) 9 pp. (27s. 6d.)

When the author claims, in his preface, that this book is written for law students, he must be taken to include in that phrase all practitioners other than those well versed in the law of taxation. Even those already knowledgeable in this branch of the law may well regard this as one of the student's textbooks which is not to be relegated to the top shelf, but to remain handy for quick reference. This book is by far the best introduction to the complicated field of tax law that is available.

The new edition, which states the law as at August, 1957, contains a new chapter on pension schemes and retirement annuities. Further, a few pages devoted to the complicated subject of double taxation is most useful in providing the student and practitioner with that very useful indication of the necessity in certain types of cases to look farther afield. The approach being that of the lawyer rather than the accountant, the book is readable without its continuity being interrupted by long and tedious examples. Nevertheless, where brevity inevitably brings some obscurity in its train, an additional numerical example relegated to a footnote might help perhaps elucidate the text for the benefit of the student.

Those practitioners who, through fear rather than inability, have too long delayed acquiring a basic knowledge of taxation, may well read the whole of this short digest with interest and will undoubtedly profit thereby.

D. R. S.

We have also received:—

The Law of Auctioneers' and Estate Agents' Commission. Second ed. By David Napley, Solicitor. The Estates Gazette, Ltd. xxxii, 280 and (index) 10 pp. (£2 2s.)—This book is, no doubt, written with one eye on auctioneers and estate agents and the other on lawyers, but its utility to the latter is not diminished on this account. All it means is that it is perhaps a little longer than it might otherwise have been and at the end of each chapter there are epitomes of the leading cases on the subject. Estate agents seem to be a litigious lot, but the author has probably run to earth all the reported

cases. In the appendices are set forth the scale of professional charges and a few precedents. The author seems to have covered the ground fully.

Hanson's Death Duties. Tenth ed. Second Cumulative Supplement Sweet & Maxwell, Ltd. 94 pp. (10s. 6d.)—This supplement carries the main work down to January 1, 1958, and includes the text of, and very full notes on, the Finance Act, 1957, s. 38. The double-taxation agreements with India, Pakistan and Switzerland are also set out.